SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 57.

THE COUNTY OF BUENA VISTA, IN THE STATE OF IOWA, PLAINTIFF IN ERROR,

vs.

THE IOWA FALLS AND SIOUX CITY RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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Opinion		

1 In the Supreme Court of Iowa. June Term, 1880.

Appeal from Buena Vista District Court.

THE COUNTY OF BUENA VISTA, IN THE STATE OF IOWA, Appellant,
vs.
THE IOWA FALLS & SIOUX CITY RAILROAD COMPANY, Appellee.

Galusha Parsons, attorney for appellant; I. N. Kidder, G. S. Robinson, and E. S. Bailey, attorneys for appellee.

Appellant's Abstract of Record.

On the 2d day of October, 1876, the county of Buena Vista filed in the office of the clerk of the district court of said county the following petition in equity:

2 I. The petition of the above-named plaintiff respectfully shows to this court that it is, and was at all the times hereinafter mentioned, a municipal corporation, duly organized under the laws of the State of Iowa, in the year 1859; that the defendant is a corporation duly organized and doing business under the laws of said State.

II. The plaintiff further says it is the owner in fee-simple of the following described real estate, lying and being in the county of Buena Vista, to wit:

(The petition here described all of the lands contained in schedule "A" hereunto annexed.)

III. That said lands were granted to the State of Iowa by an act of Congress entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September 28, 1850.

IV. That the same were granted by the State of Iowa to the plaintiff herein by an act of the General Assembly of said State, entitled "An act to dispose of the swamp and overflowed lands within the State, and to pay the expenses of selecting and surveying the same." Passed January 13, 1853.

V. That each and every parcel of said lands was of the description specified in said act of Congress at the date of the passage thereof; that afterwards, to wit, in the year eighteen hundred and fifty-nine, the plaintiff caused a list of said lands to be made in legal subdivisions in all respects in accordance with the requirements of the said act of Congress and the rules and regulations of the General Land Office of the United States; that the said list, with the proper proof thereunto attached, was duly filed in the office of the secretary of State of the State of Iowa on or about the first day of January, 1860, and was thereafter duly recorded in the office of the register of the State land office, and thereafter filed in the office of the surveyor general of the United States for the State of Iowa, and thereafter, to wit, in the month of January, 1866, the same was duly filed in the office of the Commissioner of the General Land Office of the United States, where it has ever since remained on file.

3 VI. That from time to time, since the filing of said list in said last mentioned office, the plaintiff has applied to the said Commissioner of the General Land Office to examine and pass upon the sufficiency thereof and to allow the same; that prior to the 7th day of July, 1875, it was wholly unable to obtain any hearing or decision thereon. That the defendant, by its agents and attorneys, appeared before said Commissioner and resisted said application and the said refusal to take up and examine said list was wholly by reason of defendant's resistance thereto and its claim to said lands. That upon the day last aforesaid the said Commissioner decided to allow plaintiff's said list; that defendant appealed from said decision to the Secretary of the Interior, who, upon the 30th day of August, 1876, reversed the decision of said Commissioner, and directed him to take no further proceedings upon plaintiff's application for the examination and allowance of said list.

VII. Plaintiff further says that upon the 5th day of July, 1871, the Governor of the State of Iowa, without being in any way authorized so to do, issued to the defendant a patent for a part of said lands, which said patent is now of record in the office of the register of the land office of the said State, at page two hundred and fifty-two of record "A, Miscellaneous Conveyances." That on the 10th day of August, of said year, he issued a patent to said defendant for all the remaining lands aforesaid, which is recorded in the book aforesaid at page two hundred and eighty three. That both of said patents are recorded in the office of the recorder of deeds for said county of Buena Vista. That said patents are a cloud upon the title of the plaintiff and wholly prevent it from making sale of its said lands, and greatly impair the value of its property therein.

VIII. Plaintiff further says that the defendant has at all times been fully informed of plaintiff's title to said lands, and that it was endeavoring to procure the proper patents therefor as evidence of its title thereto; that notwithstanding such knowledge it has fraudu-

4 lently made claim, and still does make claim, thereto adverse to your petitioner, and has from time to time offered the same for sale, and has sold, or agreed to sell, portions thereof, but to whom said sales have been made, or what particular parcels have been sold, or agreed to be sold, plaintiff is unable to state.

Wherefore plaintiff prays the judgment or decree of this court confirming and establishing its title to said lands as against this defendant, and that its said patents be declared null and void, and that they be cancelled of record in all places where they now appear upon the public records, or that it be declared to hold the said lands in trust for the benefit of this plaintiff, and directed and decreed to convey them to it, and that it be further enjoined and prohibited from asserting any title thereto by reason of its said patents, or from entering thereupon. And the plaintiff further prays that the defendant, its officers, agents and attorneys, be required to account for all sales, or agreements to sell, made by them in respect to any of said lands, with the persons to whom and when said sales were made and the conditions thereof, together with all moneys received by them, from whom and when received, and all securities held by them for future

payments thereon; that as to all such sales the defendant be declared the trustee of the plaintiff, and that it be directed and decreed to pay over all moneys received by it upon any and all of said sales, and to surrender to the plaintiff the securities it now holds therefor, and that the title of the several purchasers thereof be thereupon ratified and confirmed, and that as to the rest and residue of said lands the defendant be barred and forever estopped from having or claiming any right or title thereto adverse to the plaintiff, and for the costs of this action, and for such other and further relief as may be equitable and proper.

Interrogatories.

The plaintiff asks that the defendant, by its president, land commissioner or agents having charge of the lands described in the foregoing petition, make answer upon oath to the following interrogatories:

I. Has the defendant sold, or agreed to sell, any of the lands described in the foregoing petition? If so, state particularly what lands, to whom and when sold, the consideration, and whether paid or not, and all of the conditions of each sale.

II. Did the defendant, by its attorney, appear before the Commissioner of the General Land Office of the United States, or the Secretary of the Interior, at any time, and oppose the application made to said officers, or either of them, to take up for examination the list of lands filed in the Department of the Interior on behalf of this plaintiff? If so, when and by whom, and did said attorney file an argument before said officers, or either of them, in behalf of the defendant and in opposition to said application?

GALUSHA PARSONS.

Duly verified. *Plaintiff's Attorney.*

And on the 10th day of November, 1876, the defendant filed the following

Answer.

Comes now the defendant, and answering the petition of the plaintiff herein.

First Division.

I. Admits that plaintiff is a municipal corporation, being one of the counties of the State of Iowa, but denies that it had any legal or corporate existence prior to the year 1860.

II. Denies that the plaintiff is the owner of, or has any right, title, or interest in or to the real estate described in plaintiff's petition.

III. It denies that said lands were granted to the State of Iowa by an act of Congress, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September 28, 1850.

IV. Denies that the lands were granted by the State of Iowa to the plaintiff by an act of the General Assembly of said State, entitled "An act to dispose of the swamp and overflowed lands

within the State, and to pay the expense of selecting and surveying the same." Passed January 13, 1853.

V. Denies that said land, or any part or parcel thereof, was or is of the description specified in said act of Congress, and denies each and every allegation set forth and contained in the fifth paragraph of plaintiff's petition.

VI. That of the allegations contained in the sixth paragraph of plaintiff's petition this defendant has no knowledge or information sufficient to form a belief as to the truth thereof.

VII. Defendant admits that on the 5th day of July, 1871, and on the 10th day of August, 1871, the Governor of the State of Iowa by his deeds patent did, by the authority of law, patent said lands to the defendant, but denies that said patents were without authority.

VIII. Defendant admits that it has at all times made claim to said lands, and has sold portions thereof, but denies each other allegation contained in the eighth paragraph of plaintiff's petition.

Second Division.

And for a further defense to the petition and claim of plaintiff herein this defendant says:

I. That by act of Congress, approved May 15th, 1856, entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," the United States granted certain lands, in sections designated by odd numbers, to the State of Iowa, to aid in the construction of a railroad across said State, from the city of Dubuque to a point on the Missouri river near Sioux City with a branch from the mouth of the Tete Des Morts.

That by said act it was provided that the said State should
7 receive each alternate section designated by odd numbers for six miles on each side of said road, as said road should be located, and in case any of said land, so designated, should have been previously disposed of by the United States then an amount of land equal to that disposed of was granted from the odd sections within fifteen miles of said road.

II. The State of Iowa, by an act of its Legislature passed July 14th, 1856, accepted said grant, and granted said lands to the Dubuque & Pacific Railroad Company.

III. That on the 12th and 13th days of August, 1856, said railroad company located its line of road through said county of Buena Vista, and thereupon the limits of said grant became and were determined, and thereafter, on the 28th day of February, 1858, the Secretary of the Interior certified the lands described in plaintiff's petition to the State of Iowa as enuring to said State under said grant, and said State then accepted said lands so certified under said grant.

IV. That on the 2d day of March, 1868, said Dubuque & Pacific Railroad Company, and its successor, the Dubuque & Sioux City Railroad Company, having failed to build said railroad within the time prescribed by said grant, the United States, by an act of Congress

approved March 2d, 1868, extended the time for the building of said road until the first day of January, 1871.

V. That the State of Iowa, by an act of its General Assembly approved March 10, 1868, entitled "An act resuming certain rights conferred upon the Dubuque & Pacific (now Dubuque & Sioux City) Railroad Company by an act approved July 14, 1856, and acts amendatory thereof, and to repeal certain laws in relation thereto," resumed all the right, title, and interest in and to the lands described in plaintiff's petition.

VI. That the State of Iowa, by an act of its General Assembly, approved April 7th, 1868, entitled "An act to confirm and carry out a contract between the Dubuque & Sioux City Railroad Com-
8 pany, and the Iowa Falls & Sioux City Railroad Company, and to extend time for completing said road from Dubuque to Sioux City, to grant certain lands to the Dubuque, Bellevue & Sabula Railroad Company, for the building of the Tete Des Morts branch, and for other purposes," granted the lands described in plaintiff's petition to the defendant.

And this defendant having fully complied with all the provisions of said act, the Governor of the State of Iowa, on the 5th day of July, 1871, issued to this defendant a patent for a portion of the lands described in plaintiff's petition, and on the 10th day of August, 1871, a patent for the remaining lands in said petition, whereby said State conveyed said lands unto this defendant, and this defendant became and was seized in fee of said lands.

VII. That on the 17th day of August, 1871, said plaintiff, by its proper officers, entered all said lands for taxation, and caused the same to be properly and legally entered for the year 1872, and all subsequent years, for its purposes of taxation, and levied thereon for each of said years the ordinary State, county, and local taxes, and this defendant has paid to said county, and said county has required, demanded, and received and collected from this defendant, as the owner of said lands, knowing that this defendant claimed the ownership thereof, the taxes levied on said lands for the years 1872, 1873, 1874, and 1875, amounting in the aggregate to a large sum, which said taxes said countyhas appropriated and not refunded, or offered to refund, to this defendant, and said plaintiff is now equitably estopped from claiming or asserting the title to said lands, or any part or parcel thereof.

Answering the first interrogatory in plaintiff's petition, this defendant says it has sold a large amount of said lands, and will give a full statement thereof as required, within a reasonable time, to be fixed by the court.

Answering the second interrogatory, this defendant says that it did resist before the Commissioner of the General Land Office
9 and the Secretary of the Interior what it understood to be an application made by the State of Iowa that said Commissioner should take up and examine the lands certified to the State of Iowa under the act of Congress approved May 15th, 1865, to determine whether said lands, or any portion thereof, were swamp lands within the meaning of the act of Congress approved September 28, 1850.

And it did for that purpose appear by its attorney, W. F. Steiger, before both said Commissioner and said Secretary, and filed arguments therein. But this defendant did not understand or know that the application was to take up for examination lists of lands filed on the part of plaintiff, but understood it as hereinbefore shown.

And for answer to the first interrogatory of plaintiff's petition, defendant says:

That the list hereto attached shows all the lands described in plaintiff's petition which have been sold by defendant, with the name of the purchaser, date of sale, price per acre, and the amount paid thereon.

Those lands described in said list shown to have been paid in full have been deeded to the purchasers.

All the lands were sold on time, by contract, and when payment in full has not been made the deeds have not been executed.

A list of lands sold is made a part thereof.

(Hereunto annexed and marked schedule "B.")

Duly verified.

And thereupon plaintiff demurred as follows:

Now comes the plaintiff and demurs to the second division of defendant's answer, and for cause of demurrer says the same does not state facts sufficient to constitute a defense to this action.

Which demurrer was sustained as follows:

[Title of the Action.]

Now on this 14th day of November, 1876, the demurrer to the second division of the defendant's answer is sustained, and defendant excepts.

From this order the defendant appealed to the supreme court, and upon the hearing of the appeal filed the following

Assignment of Errors.

I. The court erred in sustaining the demurrer of plaintiff to the second division of defendant's answer.

II. The court erred in not overruling the demurrer of plaintiff to the second division of defendant's answer.

I. N. KIDDER,
G. S. ROBINSON,
For Appellant.

This order was affirmed by this court, 46 I., 226.

At the June term of the said district court the issue of fact came on to be tried, and the court rendered a decree in favor of the plaintiff, as follows:

[Title of the Cause.]

And now, on this day, to wit, at a term of this court begun and held on the sixth day of June, A. D. 1877, this cause came on to be tried on the issue of fact joined therein, and the plaintiff having

proved all the material allegations of said petition, and the defendant having failed to offer any evidence upon said issue, it is therefore ordered, adjudged, and decreed, and the court does hereby order, adjudge, and decree, that the title of the plaintiff to the premises described in said petition, to wit:

[Here follows a description of all of the lands described in the petition.]

Be in all things confirmed and established as against said defendant, and that the patents of said defendant be declared null and void, and that the defendant be enjoined and prohibited from asserting any title to said lands by reason of its said patents; and it appearing that the defendant has from time to time sold portions of said lands, to wit, all those pieces, tracts, and parcels described in its account of sales filed herein, and made a part of its answer, upon the terms stated in said account of sales:

11 It is further ordered, adjudged, and decreed that as to all of said tracts or parcels of lands said sales and the titles of the said several purchasers be ratified and confirmed as having been made by the said defendant in trust, for the benefit of the plaintiff herein; and it is further ordered and decreed that as to said tracts so sold the defendant pay over to the plaintiff the said several sums therein stated to have been received by it upon said sales, with interest at the rate of six per cent. per annum from the dates of said receipts, by it, and that as to the rest and residue of the purchase-money agreed by said several purchasers to be paid by them upon the several purchases respectively, and now remaining unpaid, the defendant be decreed to hold said contracts and securities as the trustee of the plaintiff, and that said purchasers may pay all moneys remaining unpaid to the plaintiff, or, if any portion thereof has been received by the defendant since the time of filing said account, that it make and render a true account thereof upon oath to this court, and that the defendant be enjoined and prohibited from in any way disposing of any of the securities now so held by it, or from in any manner interfering with plaintiff's collecting said unpaid moneys according to the terms of this decree; and it is further ordered, adjudged, and decreed that except as to the lands sold as aforesaid, the defendant be barred and forever estopped from having or claiming any title thereto adverse to this plaintiff; and it is further ordered, adjudged, and decreed that the plaintiff have and recover from the defendant the several sums so received by it as stated in its said account, and the interest thereupon, computed as hereinbefore directed, amounting at this date, in the aggregate, to the sum of nineteen thousand nine hundred and ten dollars and seventy-seven cents, together with the costs of this action, taxed by the clerk of this court at the sum of twenty-five dollars and fifty cents, and that execution issue therefor. Signed June 9th, 1877.

On the seventeenth day of July, 1877, the defendant filed in said court a petition as follows:

12 [Title of the Cause.]

To said honorable court:

The defendant above named, The Iowa Falls & Sioux City Railroad Company, represents unto your honorable court:

I. That at the November term, 1876, of said court, the plaintiff commenced an action herein above entitled, to quiet the title to certain lands situated in said county, and for equitable relief. That the issues in said cause were made up.

This defendant answered at the said November term that this defendant, in the first count of its answer to plaintiff's petition, denied plaintiff's allegation that the lands described in said petition are, or ever were, swamp and overflowed lands, within the meaning of the act of Congress of September twenty-eighth, 1850, and defendant, for a second defense and for a second count of its answer, plead an equitable estoppel.

That at said term said plaintiff demurred to the second count of said answer, and the demurrer was sustained. Thereupon defendant appealed from said order to the supreme court of Iowa, and said court rendered its opinion affirming such order on the eleventh day of June, 1877. Defendant refers to the record in this cause to show more fully the facts above stated.

II. That upon the issued joined in the case, it became and was necessary to determine whether the lands described in plaintiff's petition were swamp lands within the meaning of the act of Congress of September twenty-eighth, 1850.

That the defendant's officers and agents believed that said lands were not in fact swamp and overflowed lands, but at said November term of court had not made any actual survey of said lands, and had no evidence of the actual quality thereof.

III. That Mr. I. N. Kidder was the attorney of said defendant in the action originally, and at the request of the defendant, at said November term, he engaged G. S. Robinson, Esq., to assist in

13 the conduct of said case for the defense, and he understood and believed that in the management of said case in said county, and especially in conducting the same in the courts in said county, said Robinson should have chief control, said Kidder to prepare the evidence so far as possible.

That said I. N. Kidder resided in Boone, Iowa, and said G. S. Robinson in Buena Vista county, at Storm Lake.

IV. That in pursuance of such understanding, said I. N. Kidder proceeded at once, after said November term of court, to procure an actual survey of all said lands in dispute, by experienced surveyors, to determine their character, and consulted experienced surveyors in respect thereto.

That at the time of the adjournment of said term of court it was the approach of winter, and before a survey could be commenced winter had set in; that it was impracticable to make a survey during the winter months; that said county of Buena Vista, in which said land is situated, is comparatively a new county; that but a very

small portion of the land is under cultivation, and but a very little of that under cultivation is under fence; that during the winter it was impossible to determine the situation of the particular tracts of land or to determine its quality; that in the spring of 1877 it was extremely wet, so that it was impossible to determine the quality of the lands or proceed with any survey; that Mr. I. N. Kidder had engaged one Laurence Regan, an experienced surveyor, to proceed with the survey as soon as the weather was favorable, and at the earliest possible time to go to said county and procure assistance and make a complete survey, under the direction of G. S. Robinson, Esq.

That said Regan went to said county, starting on the fourth day of June, 1877, but was unable to see said Robinson until after the final decree had been entered in said case.

V. That said attorney, I. N. Kidder, had made inquiry of persons residing in the district, including said county, it being the fourteenth judicial district, to learn when the first term of the district court in said county in the year 1877 would be held, and shortly after
14 the November term of said court was informed that it would be on the fourteenth day of June, 1877. That said county had been included in the new fourteenth judicial district, and the terms were to be changed from the assignment made in the year 1876, and said Kidder had no knowledge of the time of holding said court, except what he had learned from inquiring of the attorneys in said county and others, made after said new term, who informed him that the term had been fixed by the newly elected judge at the time above stated.

VI. That said I. N. Kidder had expected and prepared to be present at said term of court on the fourteenth day of June, 1877, and to assist said G. S. Robinson in procuring a continuance of said action until a survey of said lands could be completed, or until that branch of the case then pending in the supreme court could be determined.

That said term was in fact held upon the fourth day of June, 1877; that Mr. G. S. Robinson, attorney as aforesaid, was in attendance, but he had misunderstood the directions of the said Kidder, and not believing himself authorized thereto, made no appearance in the case, and the defendant made no appearance whatever at said term.

VII. That at said term the plaintiff appeared by its attorney and procured judgment and decree against this defendant, a true copy of which decree, together with a memorandum of the evidence offered by plaintiff, is hereto attached and made a part hereof, and marked "A."

VIII. That said I. N. Kidder was not aware that said court commenced on the fourth day of June, 1877, or that any action had been taken in said case until said court had finally adjourned.

IX. That the plaintiff, in the trial of said cause, offered no evidence of the actual condition or quality of said land. That all the evidence introduced in respect to the quality of the land was a list of swamp land selections and certified copy of proofs on file in the

office of the register of the State land office, the certificate being made by the said register.

15 That there was no evidence that said lists and selections had ever been filed in the office of the Commissioner of the General Land Office, or that the same had ever been approved by him, and, in fact, all the evidence in respect to the quality or character of said lands was that the same had been selected by the agents of the county, and the selections had been returned to the State land office.

X. That, in fact, a great part of said lands, including nearly all of that sold by defendant, never was swamp or overflowed lands, or lands unfit for cultivation; that a portion of the lands was among the driest and best lands in said county, and about five-sixths of said lands never was swamp or overflowed within the meaning or intent of the act of Congress of September twenty-eighth, 1850, and was the absolute property of this defendant. Defendant refers to the affidavits of ——— ———, which are hereto attached and made a part hereof.

XI. That defendant appeared and defended in said action in good faith, and at all times intended to show the true quality of the lands in dispute, and unless permitted so to do will be greatly prejudiced, and meet with irreparable loss.

Wherefore defendant asks that an order may be made vacating said decree and setting aside said judgment, and permitting this defendant to come in and defend. And defendant further asks that the judge of this court, in vacation, make an order that no execution shall issue in said case until this petition shall be heard and finally determined.

I. N. KIDDER,
G. S. ROBINSON,
Defendant's Attorneys.

Duly verified.

To this petition were annexed a copy of the decree and the following exhibits; all of which were properly entitled and duly verified by the parties named therein.

16 *Judge's Memorandum of Plaintiff's Evidence.*

1. List of swamp land selections certified by register of State land office. 2. Certified copy of proofs on file in office of register of State land office. 3. Certified copy of application of Governor. 4. Copy of decision of Commissioner of General Land Office on page 276. 5. Copy of notice to Van Deventer. 6. Notice of appeal from decision of Commissioner. 7. Decision of Assistant Secretary of the Interior.

I, G. S. Robinson, being duly sworn, on oath say: That I was employed by the defendant in the case of the county of Buena Vista against the Iowa Falls & Sioux City Railroad Company, to appear at that November term, A. D. 1876, of the district court of Buena Vista county, Iowa, in which the said cause was then pending. That I understood that my engagement extended to services rendered at

said term, and to such other services as might thereafter be specifically required. That I never in any manner understood that I was to enter any other appearance in said cause than that above indicated without further solicitation thereto. That I was not requested to appear in said cause at the June term, A. D. 1877, of said court. That I was in court when said cause was called, but did not believe myself authorized to appear therein at said last term. That I then believed Mr. I. N. Kidder was the attorney in said cause, on whom the defendant therein relied to manage the same, and the attorney upon whom the entire responsibility of conducting the defense rested. That I did not learn that the defendant expected me to conduct said defense until after the close of the term of court last above named.

G. S. ROBINSON.

I, L. Regan, being first duly sworn, on oath say: That I am now, and for the last twenty-three years have been, a resident of the county of Boone, in the State of Iowa. That I am fifty-seven years of age. That I am now, and have been for said twenty-three years, a land surveyor, and during sixteen years of said time I was county
17 surveyor of said county of Boone. That during the last six years I have had a large experience in surveying swamp and overflowed lands within the meaning of the act of Congress approved September twenty-eighth, A. D. 1850. That for about one year prior to the time when I became a resident of said county of Boone, I was land examiner for the Illinois Central Railroad Company in the State of Illinois. I further depose and say that I know the descriptions and number of acres claimed by the plaintiff in the above-entitled cause of The County of Buena Vista *vs.* The Iowa Falls & Sioux City Railroad Company to be swamp and overflowed within the meaning of said act of Congress. That I have personally surveyed about six-sevenths of all the land involved in said controversy, and that I am personally acquainted with the character of the country which includes the remainder thereof. That of all the tracts surveyed as aforesaid, not more than one-sixth thereof are swamp and overflowed within the meaning of said act, that is, not more than one-sixth of the legal subdivisions, to wit, lots and forty-acre tracts have more land wet and unfit for cultivation in each of said tracts therein than of land dry and fit for cultivation; that of the portions of said lands as yet not surveyed by me, to the best of my belief, less than one-sixth of it is swamp and overflowed within the meaning of said act; that I verily believe that of all the land involved in said action, as subdivided into lots and forty-acre tracts, by virtue of the laws of the United States, that portion included in the legal subdivisions, the greatest part of which is wet and unfit for cultivation, composes less than one-sixth thereof.

And I further depose and say that I spent the time commencing with November sixth, A. D. 1876, and ending with June sixth, A. D. 1877, in the northwest part of Iowa; that I know the general character of the weather during said time, and the difficulties to be encountered during said season in selecting swamp and overflowed lands in said county of Buena Vista; that the lands involved in

said controversy could not, with reasonable diligence, have been fully and accurately surveyed during the period of time last
18 above mentioned; that the corners could have been found with difficulty, or could not have been found at all during much of said time; that the true character of land, as to its character of being wet or dry, could not have been ascertained with accuracy during most of said time, for the land was either dry and hard in the fall or frozen and covered with snow in the winter and early spring; that the portions of said season during which said land could have been properly and accurately surveyed, as aforesaid, was not sufficient to permit such survey to be made and completed prior to the tenth day of June, A. D. 1877, as I verily believe.

LAURENCE REGAN.

I, S. W. Hobbs, being duly sworn, on oath say: That I am now, and have been since the month of May, A. D. 1870, a resident of the county of Buena Vista and State of Iowa; that during all of said time I have been engaged in the business of surveying and selling land; that during three years and a half of said time I have held the office of county surveyor of said county; that I am personally familiar with all the land in said county, and especially with that in the central and western portions thereof; that I know the kind of weather experienced in said county between the tenth day of November, A. D. 1876, and the tenth day of June, A. D. 1877, and the difficulties which would have attended an attempt to select swamp lands therein; that said county is thinly settled, especially in such parts as contain the most swamp land, and is almost entirely without fences; that during winter and early spring following November tenth, A. D. 1876, nearly all the prairie grass in said county was unburned, and furnished ample lodgment for snow; that there was considerable snow in said grass during said times, and that the spring of A. D. 1877 was wet; that it would have been very difficult, and in my opinion impossible, to make an accurate survey of said county, and select the swamp lands therein, during most of this time last aforesaid; that it would have been difficult, and in many cases impossible, to ascertain the corners and boundaries of the different legal subdivisions of land.

19 I further depose and say that I know the descriptions of the lands involved in the controversy in the case of The County of Buena Vista, in the State of Iowa, *vs.* The Iowa Falls & Sioux City Railroad Company, in the November term, A. D. 1867, of the district court of Iowa in and for the said county; that I have a thorough knowledge of the localities in which said lands are situated, and in most cases I have personal knowledge and am personally familiar with the tracts of land claimed by plaintiff in said action as swamp lands and overflown, within the meaning of the act of Congress approved September twenty-eight, A. D. 1850; that I know of my own personal knowledge that less than one-fourth of the land claimed by plaintiff as aforesaid is swamp and overflown land within the description of said act; that less than one-fourth and, as I verily believe, less than one-sixth of all the land involved in said

action, as subdivided into lots and forty-acre tracts by virtue of the laws of the United States, is now or has been swamp and overflown, or wet and unfit for cultivation.

S. W. HOBBS.

I, G. S. Robinson, being duly sworn, on oath say: That I am one of the attorneys for defendant in the application of defendant to vacate the judgment rendered by the district court of Buena Vista county, Iowa, at the June term thereof, in an action in which The County of Buena Vista is plaintiff and the Iowa Falls & Sioux City Railroad Company is defendant; that the Hon. Ed. R. Duffie, sole judge of said court, is now absent from the State of Iowa, and is by deponent believed to be either in the State of Illinois or the State of New York; that the Hon. J. W. Weaver, now judge of the circuit court in and for Buena Vista county, resides in the town of Algona, in the county of Kossuth; that said place of residence is one hundred miles, by the nearest route usually traveled, from defendant's place of residence, and can be reached only at the expense of much time and labor; that said Judge Weaver is frequently away from his said place of residence, and that he informed defendant that he intended to spend a portion of the summer of 1877 in Minnesota; that defendant believes it to be very uncertain when Judge Weaver could be found; that there is great danger, unless immediately restrained, said plaintiff will at one seek to enforce said judgment; that great and irreparable loss would or might thereby result to said defendant.

G. S. ROBINSON.

An injunction was granted, as prayed in said petition.

To which petition the plaintiff demurred as follows:

Now comes The County of Buena Vista and demurs to the petition, and for cause of demurrer says:

I. The same does not state facts sufficient to entitle the petitioner to the relief therein demanded, for the following reasons:

1. It does not appear that the failure to defend said action was caused by any unavoidable casualty or misfortune.

2. It appears that the failure to do so was wholly by reason of the negligence of said petitioner, and its agents, officers, and attorneys.

3. It appears that said petitioner was present by attorney, and it does not appear that any application was made to postpone or continue said action.

4. That the defendant or its attorneys did not know the time of the session of said court, or did not properly inform themselves in respect thereto, is not an unavoidable casualty or misfortune.

5. That petitioner did not properly instruct its attorneys as to the duties for which they were employed is not such a casualty or misfortune, or that they misunderstood their instructions.

6. It does not state any facts showing that said petitioner has any defense to said action or title to the said lands, or what lands it

claims, or what claim it makes, or what defense it claims to have to said action.

21 II. Said petition states facts which avoid the same.

1. It appears that said petitioner's claim to said lands was tried and determined against it upon demurrer.

2. It appears by the allegations thereof that the question as to the character of said lands was properly triable before the Commissioner of the General Land Office, and that this court has no jurisdiction thereof, and it does not appear that said petitioner has made any application to the said Commissioner to try and pass upon its claim, and until such application this court can exercise no jurisdiction in respect to the same.

3. It appears by the allegations thereof that petitioner refused to submit its claim to said lands to the Federal officers having exclusive jurisdiction to hear and determine the same.

4. Said petition shows that the failure to make defense upon said trial was solely by reason of the negligence of the petitioner, its officers and attorneys.

The court sustained the demurrer, with leave to the plaintiff in error to amend its petition; and thereupon its counsel filed the following:

[Title of the Cause.]

To the honorable court:

Comes now The Iowa Falls and Sioux City Railroad Company, which was the defendant in the cause above-entitled, and, by leave of the court, files this its amended petition and application, and asks the court that a new trial may be granted in said action, and the judgment and decree therein rendered may be vacated, and for cause shows:

1. That at the November term, 1876, of said court, the county of Buena Vista, in the State of Iowa, commenced its action against the Iowa Falls and Sioux City Railroad Company, to quiet the title to certain lands situated in said county. That the issues in said action were made up, the said railroad company answering therein at said term, and reference is had thereto; that for greater cer-

22 tainty, the petition in said action is hereto attached, marked Exhibit "A," and the answer is hereto attached, marked Exhibit "B." That the plaintiff in said action claimed that said lands were swamp lands within the meaning of the act of Congress of September twenty-eight, 1850, and that the same had been duly selected by said plaintiff in the year 1859, and the selection filed thereafter in the office of the secretary of State of the State of Iowa, and in the office of the surveyor general of the United States for the State of Iowa, and in the office of the Commissioner of the General Land Office of the United States. The plaintiff therein further alleged that the said Iowa Falls & Sioux City Railroad Company claimed said lands (described in Exhibit "A,") under two certain patents from the Governor of the State of Iowa, alleging that the same were given through mistake, and that said patents were

duly recorded in the office of the recorder of said county, and asking that said patents be cancelled, and the title quieted in said plaintiff; that the said records of said county have been burned since the said November term of court, and this applicant cannot obtain the original in time to make exhibits to attach hereto, but avers that said patents conveyed to said railroad all the lands described in the petition of said county, and that said patents showed upon their face that they were made to said railroad under the act of the General Assembly approved April seventh, 1868, entitled "An act to confirm and carry out a contract between the Dubuque & Sioux City Railroad Company and the Iowa Falls & Sioux City Railroad Company, and to extend the time for completing said railroad from Dubuque to Sioux City, and to grant certain lands to the Dubuque, Bellevue & Sabula Railroad Company, for the building of the Tete Des Morts branch, and for other purposes," and that said lands were granted to the State of Iowa for railroad purposes, under the act of Congress of May fifteenth, 1856. That said railroad, in the first division of its answer, denied all the allegations of plaintiff's petition, except the making of said patents and the claim of title under the same, and in the second division of said answer plead an equitable estoppel; that said county demurred to
23 the second count of the answer, pleading an estoppel, and the court sustained the demurrer, from which ruling an appeal was taken by said railroad, and said ruling was affirmed by the supreme court on the eleventh day of June, 1877.

2. That upon the issues joined in said action it became, and was, necessary, among other things, to determine whether the said lands were swamp lands within the meaning and intent of the said act of Congress of September twenty-eighth, 1850, and whether said patents were wrongfully issued to said railroad; that said railroad, its officers and agents, had always believed that said lands were not swamp lands, but that said lands were owned in fee under said patents; that said railroad, prior to said November term of court, had no occasion to and had not made any survey of said lands to determine their character, and had no evidence whatever in respect thereto.

3. That Mr. I. N. Kidder was the attorney of the defendant in the action originally, and, at the request of the defendant at said November term, he engaged G. S. Robinson, Esq., to join with him in the defense, and said defendant, by its proper officers, also desired said Robinson to engage in the defense; that it was the understanding and belief of said Kidder and the officers of said company, from what they had said and written to said Robinson, that he was retained, and they intended that he should understand that he was retained, and they in fact retained him to take chief charge and control of the management and trial of said case in the court of said county, said Kidder, so far as possible, to prepare the evidence; that said Robinson resided at Storm lake, in said Buena Vista county, and said Kidder in Boone county.

4. That the officers of said railroad left the full management and control of said case to said attorneys, and said officers had no control or supervision of the case after engaging counsel; that the chief

office of said railroad is at Cedar Rapids, Iowa. None of the officers of said railroad live nearer Buena Vista county than Cedar Rapids; that said officers gave to said attorneys all the information in
24 their knowledge in respect to said case, and left to them the management thereof, and had no knowledge of the subsequent action of said Buena Vista county therein.

5. That in pursuance of said understanding said I. N. Kidder proceeded at once, after said November term of court, to procure an actual survey of all of said lands in dispute by experienced surveyors to determine their actual character, and consulted experienced surveyors in respect thereto; that at the time of the adjournment of of said term of court in November, 1876, it was near the approach of winter, and before a survey could be had winter had set in; that it was impracticable to make a survey during the winter months; that said county of Buena Vista, in which said land is situated, is comparatively a new county; that but a very small portion of the land is under cultivation, and but little of that under cultivation is fenced; that during the winter, with snow upon the ground, it was impossible to determine the situation of the particular tracts so as to determine the quality or to find the particular subdivisions; that in the spring of 1877 it was extremely wet and rainy in said Buena Vista county, so that it was impossible to proceed with the survey or to determine the quality of the land; that Mr. I. N. Kidder had engaged an experienced surveyor, one Laurence Regan, to make said survey as soon as it was possible to make the same, and had directed said Regan, and said Regan had engaged to go to said county at the earliest possible time and procure assistance and make the survey under the direction of said G. S. Robinson; that said Regan, in pursuance of such agreement and direction, went to said county, and arrived at Storm lake therein on the morning of the fifth day of June, 1877, but was unable to see said Robinson, he being in attendance upon court in Sioux Rapids, in said county, until after the final decree was entered in said case.

6. That said I. N. Kidder fully intended to be present at the first term of said court succeeding the November term, 1876, and ask for a continuance of said cause until the character of said lands
25 should be determined, and evidence of the quality could be procured; that said county of Buena Vista, formerly belonging to the fourth judicial district of Iowa, had, in the year 1876, been included in the new fourteenth judicial district, and the assignment of terms made for said fourth district for the year 1877 became void; that after the November term of said district court, and prior to June, 1877, to wit, in the winter and spring of 1877, said I. N. Kidder made inquiry of different attorneys in said fourteenth judicial district, and of said Buena Vista county, who claimed to know when the next term of the district court of said county would be held, and was informed and believed that said term would commence on the fourteenth day of June, 1877; that said Kidder had no knowledge of the actual time of holding said court, but relied upon the information so given; that said defendant had no other cases in said county or in said judicial district, and said Kidder had no other legal busi-

ness in said court; that believing that said term would not commence before the fourteenth day of June, said I. N. Kidder, on the fourth day of June, 1877, went to Iowa City, in Johnson county, and there attended the district court of said county, on legal business. From there he went to the district court of Story county, Iowa, where he arrived on Thursday of said week, and where he had four cases of importance to attend to for the Iowa Railroad Land Company; that the district court of Boone county, in which county said Kidder resided, and in which court said Kidder had many important cases, was assigned for the thirteenth day of June, and said Kidder, at great inconvenience, and at considerable expense, had engaged other attorneys to manage said cases until he should return from his contemplated attendance upon the Buena Vista district court; that in the spring of 1877 the said Iowa Falls and Sioux City Railroad Company, the Iowa Railroad Land Company, and the Cedar Rapids and Missouri River railroad had a large and unexpected increase in legal business, both as defendants and as plaintiffs, in actions which they were obliged to commence to avoid the statute of limitations; that said companies were and are all under one management at Cedar Rapids, and said Kidder was an attor-
26 ney in all of said actions, which were not less than four hundred and fifty in number, and were pending in the courts of twenty different counties; that as said causes involved matters of State and national legislation and official rulings for twenty years, it was impossible to leave said cases to the control of local attorneys, and said Kidder was engaged in the active management thereof.

7. That said Kidder had expected and prepared to be present as aforesaid and assist the said G. S. Robinson in the continuance of said action, until a full survey could be completed, and in trial in case a continuance could not be procured; that at said November term said Kidder had informed said Robinson of all he knew of the nature of the action, and of the defense, and of all the defendant knew in respect thereto; that none of the officers or agents of the defendant, except said G. S. Robinson, knew of the actual time for holding said court. That said term was in fact held upon the fourth day of June, 1877; that said G. S. Robinson, attorney as aforesaid, was in attendance upon said term; that he had entirely misunderstood the directions of the defendant, of said Kidder, and the extent of his retainer, and actually understood and believed that he was not employed to assist in said case, or take any part therein after the November term, 1876, unless further specially directed thereto, and not believing himself authorized or directed thereto, made no appearance in said case at said June term, 1877, and no appearance was made therein by the defendant or in its behalf, or no evidence offered in its behalf.

8. That at said term the plaintiff appeared by its attorney and procured judgment and decree against the defendant, a true copy of which decree is hereto attached and made a part hereof and marked Exhibit "C," also attached thereto a memorandum by the said court of the evidence introduced by plaintiff. That said I. N. Kidder was not aware that said court had been in session, or that any action

had been taken in said case, until informed by letter, dated the tenth day of June, 1877, received as he was preparing to attend said court.

27 9. That the plaintiff in the trial of said case offered no evidence of the actual condition or quality of said lands; that all the evidence introduced in respect to the quality of the lands was a certified copy of a list of swamp-land selections, and certified copy of proof of such selections, on file in the office of the register of the State land office, the certificate being by the said register; that there was no evidence that said selections and lists had been filed in the surveyor general of the United States for the State of Iowa, or in the office of the Commissioner of the General Land Office, or that the same had been approved, and, in fact, all the evidence in respect to the character or quality of the lands was that they had been selected by the agents of the county, and the selections filed in the State land office.

10. That, in fact, a great portion of said lands, including nearly all that portion sold by said defendant, were not, and never had been, swamp or overflowed lands or lands unfit for cultivation; that a portion of said lands were among the driest and best portions of said Buena Vista county, and a large portion never were swamp or overflown within the meaning or intent of the act of Congress of September twenty-eighth, 1850, and were the absolute property of this defendant.

11. That defendant appeared and defended in said action in good faith at the November term, 1876, and at all times intended to show the true character of said lands in dispute; that the survey of said lands by said Regan was completed in July, 1877, and a true list of the dry lands of the lands in dispute, together with the affidavit of the surveyor in respect thereto, is hereto attached, marked "D," and made a part hereof; that said defendant could have shown after said survey, and can now show if permitted to defend, that all of said lands in said list are not, and never were, swamp and overflowed within the meaning of the act of Congress of September 28th, 1850. Defendant can also show that the lists of selections of swamp lands made by said county were never approved by any competent authority, but were rejected; that unless permitted to defend

28 and offer evidence in said case, and unless a new trial is granted this defendant will meet with great and irreparable loss.

12. And your petitioner further shows that all the evidence offered by the plaintiff as to the amount, description of, and amount received for lands sold, was the list furnished and filed by the defendant, as shown by the same on file. That said list did not show or purport to show the times when the payments were made, and the greater portion of said payments were made to and received by said company long after the sale of the lands which were sold on contract. Yet said defendant was charged with and judgment entered for the interest on the amount received long prior to its receipt, and from dates of sale; and said defendant, if permitted, can show that said lands were sold on time and partial payments received long thereafter; wherefore this applicant prays that an order may be made

vacating said decree and judgment, and that a new trial thereof may be granted, and then this applicant may be permitted to come in and defend, and that the execution of said judgment and decree may be restrained until this petition and application shall be finally determined.

I. N. KIDDER,
G. S. ROBINSON,
Attorneys for Iowa Falls & Sioux City R. R. Co.

Duly verified.

To this petition the following exhibits were attached:

"A." Original petition, *supra*, p. 1.
"B." Answer, p. 5.
"C." Decree, p. 10.
"D." Affidavit of Regan, as follows:

I, L. Regan, being duly sworn, do depose and say: That I have completed the survey of all the lands included in the list claimed by the plaintiff in the case of the County of Buena Vista *vs.* The Iowa Falls & Sioux City Railroad Company, commenced in the district court of said county during A. D. 1876; that of said lands the following are dry and fit for cultivation, and are not swamp
29 and overflown within the meaning and definition of the act of Congress approved September twenty-eighth, 1850, to wit:

(Here is described a list of lands, hereinafter printed as schedule "C.")

I further depose and say that some of the above-described land is entirely cultivated, and is among the best improved land in this county; that of the entire list of land claimed by plaintiff in said action not more than one-sixth is swamp and overflowed, within the meaning and definition of said act of Congress, to the best of my opinion; that I am the identical L. Regan who made an affidavit in said cause on or about the ninth day of July, A. D. 1877.

LAURENCE REGAN.

Duly verified July eighteenth, 1877.

To which petition plaintiff demurred as follows:

Comes now the said County of Buena Vista, by its attorney, and demurs to the amended petition of the said Iowa Falls & Sioux City Railroad Company, and for cause of demurrer says:

I. The same does not state any fact or facts entitling the said railroad company to the relief demanded, for the following reasons:

1. It does not show diligence upon the part of said company in preparing for the trial of said action.

2. It does not show that said company, its officers, agents, or attorneys, made preparation for said trial, or that they might not, by reasonable diligence between the time of the commencement of said action and the trial thereof, have been fully prepared for trial.

3. It does not show what acts, if any, were done by said company

had been taken in said case, until informed by letter, dated the tenth day of June, 1877, received as he was preparing to attend said court.

27 9. That the plaintiff in the trial of said case offered no evidence of the actual condition or quality of said lands; that all the evidence introduced in respect to the quality of the lands was a certified copy of a list of swamp-land selections, and certified copy of proof of such selections, on file in the office of the register of the State land office, the certificate being by the said register; that there was no evidence that said selections and lists had been filed in the surveyor general of the United States for the State of Iowa, or in the office of the Commissioner of the General Land Office, or that the same had been approved, and, in fact, all the evidence in respect to the character or quality of the lands was that they had been selected by the agents of the county, and the selections filed in the State land office.

10. That, in fact, a great portion of said lands, including nearly all that portion sold by said defendant, were not, and never had been, swamp or overflowed lands or lands unfit for cultivation; that a portion of said lands were among the driest and best portions of said Buena Vista county, and a large portion never were swamp or overflown within the meaning or intent of the act of Congress of September twenty-eighth, 1850, and were the absolute property of this defendant.

11. That defendant appeared and defended in said action in good faith at the November term, 1876, and at all times intended to show the true character of said lands in dispute; that the survey of said lands by said Regan was completed in July, 1877, and a true list of the dry lands of the lands in dispute, together with the affidavit of the surveyor in respect thereto, is hereto attached, marked "D," and made a part hereof; that said defendant could have shown after said survey, and can now show if permitted to defend, that all of said lands in said list are not, and never were, swamp and overflowed within the meaning of the act of Congress of September 28th, 1850. Defendant can also show that the lists of selections of swamp lands made by said county were never approved by any competent authority, but were rejected; that unless permitted to defend

28 and offer evidence in said case, and unless a new trial is granted this defendant will meet with great and irreparable loss.

12. And your petitioner further shows that all the evidence offered by the plaintiff as to the amount, description of, and amount received for lands sold, was the list furnished and filed by the defendant, as shown by the same on file. That said list did not show or purport to show the times when the payments were made, and the greater portion of said payments were made to and received by said company long after the sale of the lands which were sold on contract. Yet said defendant was charged with and judgment entered for the interest on the amount received long prior to its receipt, and from dates of sale; and said defendant, if permitted, can show that said lands were sold on time and partial payments received long thereafter; wherefore this applicant prays that an order may be made

vacating said decree and judgment, and that a new trial thereof may be granted, and then this applicant may be permitted to come in and defend, and that the execution of said judgment and decree may be restrained until this petition and application shall be finally determined.

I. N. KIDDER,
G. S. ROBINSON,
Attorneys for Iowa Falls & Sioux City R. R. Co.

Duly verified.

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29 and overflown within the meaning and definition of the act of Congress approved September twenty-eighth, 1850, to wit:

(Here is described a list of lands, hereinafter printed as schedule "C.")

I further depose and say that some of the above-described land is entirely cultivated, and is among the best improved land in this county; that of the entire list of land claimed by plaintiff in said action not more than one-sixth is swamp and overflowed, within the meaning and definition of said act of Congress, to the best of my opinion; that I am the identical L. Regan who made an affidavit in said cause on or about the ninth day of July, A. D. 1877.

LAURENCE REGAN.

Duly verified July eighteenth, 1877.

To which petition plaintiff demurred as follows:

Comes now the said County of Buena Vista, by its attorney, and demurs to the amended petition of the said Iowa Falls & Sioux City Railroad Company, and for cause of demurrer says:

I. The same does not state any fact or facts entitling the said railroad company to the relief demanded, for the following reasons:

1. It does not show diligence upon the part of said company in preparing for the trial of said action.

2. It does not show that said company, its officers, agents, or attorneys, made preparation for said trial, or that they might not, by reasonable diligence between the time of the commencement of said action and the trial thereof, have been fully prepared for trial.

3. It does not show what acts, if any, were done by said company

to prepare for trial, either before or after the term at which the issues were joined therein, nor any reason for entrusting said defense exclusively to its attorneys.

4. It does not show that any issue was joined in said action upon which it would have been competent for said company
30 to give evidence in respect to the character of said lands, or in any way to contest the title of the said county thereto, or that said company, by the issues of fact therein, made any claim of title thereto.

5. The claim of said company to said lands was in no way involved in the issues of fact upon which said trial was had, and it is alleged in said petition that its claim of title thereto was tried upon demurrer, and that it was determined both by this court and the supreme court that it had no title thereto; the affidavit of said Regan is no part of said petition.

6. It is not alleged that the lands described in the affidavit of said Regan were not in fact swamp or the property of said county, or that they were in fact rejected. Said petition does not state any facts showing that the said company has any interest in said lands or any right to contest the title of said county and its claim of ownership thereto, nor is it alleged that plaintiff's claim to said lands was in fact rejected by any officer having jurisdiction over the same.

7. Said petition in no way controverts any of the material allegations of said original petition, nor does it show that said county had not, as against the said company, a title to said lands, whether the same were or were not of the description set forth in said original petition; nor does it state any fact or facts showing that the said company in any way became entitled to said lands, or to contest the ownership of the said county therein.

8. It shows that the said company, its officers, agents, and attorneys, wholly failed to make any preparation for the trial of the issue of fact in said action, or to procure a continuance thereof, or to take any means to be represented at said trial in any other way than by its attorney then present, and it does not show that any request was made to postpone said trial.

9. Said petition alleges that said court began upon the fourth day of June, and it is alleged that one of petitioner's attorneys was in attendance upon said term. It is not alleged that he was not present all of the time until the said cause was regularly reached,
31 on the sixth of said month, or that he took any steps to notify his associate counsel that said cause would be reached or had been tried, or that he might not have done so before said decree was entered on the ninth of said month.

10. It does not show that said Kidder made any reasonable or proper efforts to inform himself as to said term of court, or why he had no knowledge of the time when the same was to be held, nor state any facts sufficient to excuse him or said company from being informed when said court was held.

11. It is not alleged that said lands were not of the description set forth in said act of Congress of September twenty-eight, 1850, at

the date of the passage thereof, or that the same were not in all respects duly selected and lists thereof filed in the Land Department of the Federal Government under the provisions of said act.

12. Said petition shows that said Robinson was employed by said company to take charge of said cause in said court, and that he was in attendance thereupon at the time said judgment was rendered, and it is not alleged that he did not appear as the attorney of record in all of said proceedings. The written instructions given to said Robinson should be made a part of said petition.

13. Said petition does not show that the officers of said company made any preparation for the trial of said cause, or that they designed in any way to contest the right of said county, or that they claimed to have any defense to said action, nor does it allege any facts showing that they now claim in behalf of said company any title to said lands, or to any specific portions thereof.

14. It does not allege that the failure to defend said action was by reason of any unavoidable casualty or misfortune, nor allege any error in said judgment, nor state a case in which error can properly be alleged.

15. It is not shown by said petition whether the plaintiff's claim to said lands was or was not contested by the defendant, plaintiff in error, before the Commissioner of the General Land Office, or
32 that petitioner in any way offered to submit its claims to his decision or to contest before him the proofs of the plaintiff in respect to the character of said lands, nor are any of the allegations of the petition of the plaintiff in the original action controverted by the present petition, nor is it alleged that plaintiff's selection was not in all respects in accordance with the law under which the same was made, nor that petitioner's claims accrued prior to such selection, or that such selection was not made and in fact filed in the office of the surveyor general for Iowa, and duly forwarded to the Commissioner of the General Land Office.

16. It is not denied in said petition that plaintiff submitted its proper proofs of the selection of said lands to the Commissioner of the General Land Office and that he held said proofs sufficient, nor does said petition allege any facts in avoidance of said decision.

17. It appears by the petition and pleadings in said original action that defendant's claim of title to said lands was presented by an issue joined therein upon demurrer, and finally and conclusively decided against the petitioner, then the defendant.

II. Said petition states facts which show that a new trial should not be granted.

1. That the defendant neglected either to prepare to defend the said action or to procure a continuance thereof.

2. It was in court by its attorney of record, having chief control of said case for the defendant therein, and no application was made either to continue said cause or to postpone the trial thereof.

3. It appears that said court began on the fourth day of June, that said cause was not reached and tried until the sixth, and the said decree after the same was signed by the judge before whom said cause was tried was not finally entered in the records of said

court until the ninth, and no reason is given why the said Kidder, or the said defendant, was not informed thereof before the final adjournment of said court.

4. It appears by said petition that the petitioner's pretended
33 claim to said lands was fully adjudicated and finally determined against it upon the demurrer to the second division of its answer in said original action.

5. The petition shows gross negligence on the part of the petitioner in failing to properly instruct either of the attorneys to whom it gave the entire control of its defense as to the purposes for which they were employed, and the duties which they were expected to perform in the defense of the said action, and it appears thereby that the sole cause of the failure of its attorney present at the time said judgment was rendered was that he had not been so instructed or informed; the neglect of defendant to employ counsel, fully instructed as to the said action and to make defense therein, is not sufficient ground for vacating the judgment.

6. That one of the defendant's attorneys misunderstood the instructions which he gave to the other is not sufficient ground for vacating said judgment.

7. That one of said attorneys had no knowledge of the time of holding said court was not an unavoidable casualty or misfortune, and no facts are stated in said petition sufficient to show that such casualty or misfortune might not have been avoided by the exercise of reasonable diligence, or that the defendant had not sufficient time in which to have obtained correct information in respect thereto.

8. It is not alleged what means of information the persons of whom said Kidder made inquiry had, or that said Kidder made any inquiry after the said term of court had been fixed by the said judges, or that he might not, by reasonable inquiry, have ascertained when said term of court was to be held, and it is not alleged that said Kidder had no means of knowledge as to the time of holding said court except by inquiry of attorneys and other persons residing in said judicial district or in said county.

9. No grounds for vacating said judgment are set forth in said petition except the negligence of petitioner and its attorneys.
34 The officers of petitioner were negligent in surrendering the entire control of said action to its attorneys without proper instructions in respect thereto.

Whereupon the court ordered as follows:

[Title of the Cause.]

And now, on this twenty-ninth day of November, 1877, this cause coming on to be heard on the demurrer hereinbefore filed, the said demurrer is sustained, and defendant has leave to amend. Defendant files amended petition and plaintiff files demurrer thereto; and this cause coming on to be heard upon the demurrer of said defendant in error to the amended petition of the said Iowa Falls & Sioux City Railroad Company, plaintiff in error, it is ordered that the said demurrer to the amendad petition be sustained; and it is

further ordered that the following entry be made in the order sustaining the said demurrer, to wit: "The demurrer is sustained upon the ground that the granting of a new trial is not within the discretion of the court, but is governed by title 19 of the Code;" to all of which and to the rulings upon each of said demurrers the said Iowa Falls and Sioux City Railroad Company, by its attorneys aforesaid, at the time excepted, and the appeal bond is fixed at $20,000 to be approved by the judge of this court. And afterwards, on the same day, the court further ordered as follows:

And now on this twenty-ninth day of November, A. D. 1877, this cause having this day come on for hearing upon the petition of the above named defendant in the original action, the Iowa Falls & Sioux City Railroad Company, the said company appearing by I. N. Kidder and G. S. Robinson, its attorneys, and said plaintiff in said original action appearing by Galusha Parsons, its attorney, and now, after hearing said parties, it is ordered that the judgment rendered herein by this court on the sixth day of June, A. D. 1877, as the same appears in the records of this court signed and approved on the ninth day of June, 1877, be, and the same is, in all things affirmed as fully as the same now appears upon the records of this court aforesaid as if the same were herein fully stated and set forth.

35 And it is further ordered and adjudged that the said county of Buena Vista have and recover of and against the said Iowa Falls & Sioux City Railroad Company the said sum of nineteen thousand nine hundred and ten dollars and seventy-seven cents, the amount stated in said judgment, with the said sum of twenty-five dollars and fifty cents costs therein recovered, with six per cent. interest upon both of said sums from the date of said judgment, and the further sum of forty-four and thirty hundredths dollars, the costs of these proceedings; and it is further ordered that the injunction herein issued upon the petition of the said plaintiff in error, the Iowa Falls & Sioux City Railroad Company, be, and the same is hereby, dissolved; to all which the said Iowa Falls & Sioux City Railroad Company at the time excepted.

Read, signed, and approved in open court this first day of December, A. D. 1877, and court stands adjourned.

ED. R. DUFFIE, *Judge*.

From which the petitioner duly appealed to this court where the said order and judgment were reversed and a procedendo issued in the usual form—491,657; upon the filing whereof farther proceedings were had in said district court as follows:

May twenty-first, 1879, the defendant, petitioner, filed the deposition of James Van Deventer, taken before a notary public on the nineteenth day of May, 1879, upon notice that the same would be so taken to be read in evidence upon the trial of this action, including the application for a new trial, as follows:

Interrogatory 1. State your name, age, place of residence and occupation.

Answer. J. Van Deventer; age, forty-eight years; residence Clinton,

Iowa; occupation, president of the Iowa Railroad Land Company and vice-president of the Iowa Falls & Sioux City Railroad Company, and an officer of other companies located at Cedar Rapids, Iowa, and Clinton, Iowa.

Int. 2. What office did you hold in the year 1876 and 1877 in the defendant corporation, and how long had you held it?

36 Ans. I was vice-president of said company, and had been since 1872.

Int. 3. State what officer, if any, had the principal charge and management of the land department of said defendant, and who performed such service.

Ans. The vice-president had the principal charge and management of the land department, and, as vice-president, I performed those services; I had the charge of the business pertaining to the lands belonging to the company.

Int. 4. Who had charge of the litigation, if any, growing out of or connected with the lands of the company, and employed attorneys to look after it?

Ans. As vice-president, I had charge of such litigation, and employed attorneys to attend to the same.

Int. 5. Who employed the attorneys in this suit, and gave them directions and information respecting it?

Ans. I did.

Int. 6. State what attorneys you employed to look after and manage this suit, when you employed them, what instructions, directions, or information you gave them, and the communications and correspondence you had with them respecting this suit prior to the end of the term of court which commenced June fourth, 1877.

Ans. I employed I. N. Kidder and G. S. Robinson as attorneys to conduct this suit for the company on the third day of October, 1876. I employed them by letters, and I attach hereto copies of letters to each of them, written on that day, and marked respectively exhibits "A" and "B." I never wrote any other letter to Robinson on this subject prior to the judgment being entered, and do not recollect of having any conversation at all with him on this subject prior to that time. I did not write any other letter to Kidder on this subject, but I had conversations with him respecting the suit. My understanding was that they were fully employed to take charge of the suit and to do all that was proper and necessary to make a complete defense for the company, including the procuring of such

37 documentary evidence as they thought was advisable, and the employment of surveyors or others to examine the lands, and to take their testimony. Having this understanding of the nature and extent of their retainer, no specific instructions were given them by the company, but the company were ready and willing at all times to furnish them, or either of them, any information it possessed respecting the subject-matter of the suit when called upon; and I supposed and believed that they were furnished with all the information necessary and that was in the possession of the company.

Int. 7. State whether you or any other officer of the company had

any knowledge of any misunderstanding between Kidder and Robinson respecting the extent of their employment until after the said June term of this court in 1877, or that there was any failure on the part of them, or either of them, to be prepared for the trial of the case when it should be reached by the court.

Ans. None of the officers of the company had any knowledge of any misunderstanding between Mr. Kidder and Mr. Robinson respecting the extent of their employment until after the said June term of court, nor that there was any failure by them or either of them to be prepared for the trial of this case when it should be reached by the court; but, on the contrary, it was supposed and believed by the officers that each of them was doing or had done all that was necessary to prepare the case for trial, and that they would be present at the trial and conduct it for the company. The officers did not know that any misunderstanding existed between Kidder and Robinson, nor that there was any failure on their part to be prepared for the trial of the case until some time after the judgment was entered. The company intended and desired in good faith to make a defense in the suit, and with the belief that it had a good defense; and it appeared in said suit for that purpose, and with the intention of showing the true character of the land in controversy.

Int. 8. State what title the company had to the lands in controversy, and whether previous to the commencement of this suit the company had caused any actual survey of them to be
38 made with the view of determining whether they were swamp or dry lands.

Ans. The State of Iowa had patented all the lands in controversy claimed by the defendant to the defendant as lands enuring to the grant made by Congress May fifteenth, 1856, to aid in the construction of the line of railroad built by the defendant, the defendant having complied with the conditions imposed by the acts of Congress and of the General Assembly of the State of Iowa. The defendant had never, previous to the commencement of this suit, caused an actual survey to be made of these lands with the view of determining whether they were swamp or dry lands. It had relied upon the patents issued by the State to it as conferring a valid title, and is believed that the land generally would not have been certified by the General Government as railroad lands if the county had been entitled to them under the "Swamp Land Act."

EXHIBIT "A."

OFFICE OF THE IOWA RAILROAD LAND CO.,
CEDAR RAPIDS, IOWA, *Oct.* 3, 1876.

I. N. KIDDER, ESQ., *Boonsboro.*

DEAR SIR: Herewith find the original notice in the case of County of Buena Vista *vs.* The Iowa Falls and Sioux City Railroad Company. Tracts sold are checked in pencil. All the lands in range 36, excepting the west tier of sections and part way the west tier of forties adjoining the tier of sections mentioned, belong to the Du-

buque & Sioux City. Dumont, the managing man of that company, dropped in to-day, but had heard nothing of this suit; as soon as they are served they will put their case, I think, in hands of Gen. Clark, of Webster City, who manages their legal matters.

Yours, J. VAN DEVENTER, *President.*

39 EXHIBIT "B."

OFFICE OF THE IOWA RAILROAD LAND CO.,
CEDAR RAPIDS, IOWA, *Oct.* 3, 1876.

G. S. ROBINSON, Esq., *Storm Lake.*

DEAR SIR: Buena Vista county, by Galusha Parsons, its attorney, has brought suit against the Iowa Falls & Sioux City Railroad Company to quiet the title of lands in the county, which I suppose are claimed as swamp (though the notice does not disclose that fact), to annul the company's patent and to compel accounting for tracts sold, etc. The suit is brought in the district court of Buena Vista county, the notice stating that the complaint will be filed at Sioux Rapids October tenth, and default taken at the next term of court in November the ninth, I think. I will send notice served to Kidder, of Boonsboro, this p. m., with whom I would like to have you associated in looking after our interests in the suit, which probably will not end short of the United States Supreme Court. Please inform me if you can act for us as suggested, and if the proposed arrangement is satisfactory. Have written Mr. Kidder to this import this morning.

Yours, truly, J. VAN DEVENTER, *President.*

And upon the same day the plaintiff filed the following answer:

Answer of Plaintiff to Defendant's Petition to Vacate Judgment.

Now comes the above-named plaintiff, The County of Buena Vista, and for answer to the petition of the said defendant to vacate the judgment and for a new trial herein, says:

I. It denies the allegation contained in the second paragraph thereof, that it became necessary to determine whether said lands described in said judgment were swamp. It denies the allegation contained in the fourth paragraph thereof, that the said Kidder took any steps to procure or cause to be made a survey of said lands
40 at the time alleged. It denies that it has any knowledge or information as to whether said Kidder made inquiry of persons residing in said county or district as to the time of holding said court, or that the said Kidder had no knowledge thereof, or that he was informed that said term was fixed for the fourteenth of June, instead of the fourth. It denies that said Kidder expected to be present at said court on the fourteenth of June; as to whether Robinson had misunderstood said Kidder, it has not sufficient knowledge or information to form a belief. It denies each and every allegation of the ninth and tenth paragraphs thereof.

II. For a second and further answer thereto it says that in the

month of May, 1877, and on or about the fifteenth day of said month, Galusha Parsons, the attorney of the plaintiff herein, at the city of Des Moines, personally informed said Kidder that the said court would begin on the first Monday of June then following, and asked him if he intended to be present; that said Kidder replied that he did not know whether he should be present or not, but expected to be, that Mr. Robinson had principal charge of the case; that said Parsons then asked said Kidder if he would stipulate that certain documents might be read from the printed reports of the register of the State land office, to which said Kidder replied that he would, and would send a stipulation by mail when furnished a list of said documents, or if he could find the list previously sent him by said Parsons; defendant further says that within a very few days thereafter said Parsons wrote said Kidder furnishing a list of said documents and asking him to return a stipulation that they be read; that on or about the thirtieth or thirty-first day of May said Parsons wrote said Kidder that he intended starting for Buena Vista county, to attend court on the following Monday, and again requested him to send a stipulation as agreed upon. Defendant, further answering, says said Robinson was in court when said cause was reached upon a regular call of the docket, and was asked both by said Parsons and the court if he desired any delay in the case;
41 that he replied that he had expected Mr. Kidder, and did not know why he was not present, that he had heard nothing from him, and that he did not wish to appear, but preferred leaving the case "so that we can take our own course hereafter;" that said Parsons then said to Mr. Robinson, "I will take judgment, as I desire to leave, and will ask the court that it shall not be entered of record until the close of the term, and if Mr. Kidder comes and you desire to give any evidence, it may be taken and considered with the case;" that said Robinson in no way intimated that he was not fully authorized to take charge of the case, or that defendant desired a postponement, or was not fully ready for trial, or that its attorneys had intended applying for a continuance.

III. For a third and further answer herein the plaintiff says it caused said lands to be duly selected as swamp lands under the said grant in its petition referred to in 1859; that said selections were duly reported to the surveyor general of the United States for the district of Iowa and said list presented to and left with him, but was not by him reported to the Commissioner of the General Land Office, because of the ruling of that officer made subsequent to such selections, to wit, on the thirteenth day of July, 1866, that only such lands were embraced in said grant as were contiguous to large streams or rivers and subject by reason thereof to overflow; that said ruling of the Commissioner was reversed on the fifteenth of September then following, but notwithstanding such reversal thereof by the Secretary of the Interior, the surveyor general neglected to report said list. That the office of surveyor general for Iowa was abolished in 1866, and said original list, of which a copy is herewith produced marked Exhibit "A," and made a part hereof, was thereupon removed, to wit, in the year 1866, to the office of said Commis

s'oner at Washington city, in whose hands it has ever since remained. That prior to 1869 the State of Iowa was unable to obtain any action in respect thereto; that in 1866 the General Assembly appointed Josiah A. Harvey a commissioner on the part of
42 the State, to settle said swamp land claim with the General Government, a copy of whose report in respect thereto, together with his action concerning the same, is herewith produced and made a part hereof, and marked Exhibit "B." The said Harvey having failed to procure a recognition of said claim and a certification of said lands, prepared with special reference to the lands herein claimed, as well as all the counties named therein, the bill making part of his said report marked "K," which was duly passed by Congress and became a law on the fifth day of March, 1872; that thereafter plaintiff made application to said commissioner to certify said lands, a copy of which is hereto annexed as Exhibit "No. 1;" that one William F. Steiger, attorney and agent for the defendant herein, appeared before him and objected thereto, upon the ground that the same had been certified to the State of Iowa as falling within the limits of the Dubuque & Pacific railroad grant; that said commissioner decided, notwithstanding such objections, to take up said list for approval, a copy of which decision is herewith produced and made a part hereof, and marked Exhibit "C;" that the defendant, by its said attorney, declined to give any evidence as to the actual character of said lands, and thereupon appealed from the decision of said commissioner to the Secretary of the Interior, upon the sole ground that said commissioner had no jurisdiction over said lands, a copy of which notice of appeal is herewith produced and made a part hereof, and marked Exhibit "D." That the plaintiff's said list was then before said commissioner, together with the proofs thereunto attached as to the character of said lands, and was the only evidence before him in respect thereto. That the president of said railroad land company, James Van Deventer, was notified that the commissioner would receive evidence of the actual character of said lands if said company or this defendant so desired, but the said defendant, represented by said Van Deventer and said Steiger and Wilson, declined to give any evidence in respect thereto. That the Assistant Secretary of the Interior, in the absence of the Secretary, subsequently instructed and directed said commissioner to take no further steps in respect thereto, a copy of which instructions is
43 herewith produced and made a part hereof, and marked Exhibit "E." That the plaintiff has at all times been ready and willing to make such proof, if further proof should be required by said commissioner, as should be at any time required as to the character of said lands, but no further proof was at any time required, and the sufficiency of said proofs was not at any time questioned either by the said commissioner or this defendant; that the same were in all respects in accordance with the agreement between the State of Iowa and the officers of the General Government in respect thereto. And the plaintiff further says that the State of Iowa has at all times recognized this plaintiff's ownership of said lands, and that the same were included in said patents by

the said Governor by mistake and without any knowledge [illegible] e same had been selected as swamp lands, and without any intention upon his part to convey to this defendant any lands which had been so selected. And this plaintiff denies that the defendant has any right, title, or interest in or to said lands, or right to contest plaintiff's ownership thereof; and further says it is estopped by its refusal to give evidence before the said commissioner from now contesting the character thereof, and that the list so made as aforesaid is binding, final, and conclusive as to the character of said lands; that this court has no right, power, authority, or jurisdiction to receive evidence in respect thereto; that plaintiff's title is perfect and complete, and that said patents so issued are a cloud thereupon and otherwise of no force, validity, or effect.

IV. For a fourth and further answer to said petition the plaintiff says the defendant's said second answer was decided, held, and determined by this court to be insufficient, and that defendant wholly neglected and refused further to plead in respect to the matters therein alleged, but stood upon the sufficiency of its said answer and its claim of title as there alleged and appealed from the decision of this court to the supreme court of Iowa, where said judgment and decision of this court were in all things affirmed, which said judgments both of this court and the said supreme court are in all respects in full force and effect, and a complete and final determination of all claim of title to said lands upon the part of this defendant, and the several matters now alleged in said answer are in substance and effect identically the same as in said original answer alleged.

GALUSHA PARSONS,
Plaintiff's Attorney.

Duly verified by Galusha Parsons.

The plaintiff asks that the following interrogatories be answered upon oath by the president of the defendant, or its agents representing and having charge of said lands:

1. Did William F. Steiger and James F. Wilson, as agents or attorneys of the defendant, appear before the Commissioner of the General Land Office in 1875, and resist the application of the plaintiff and the Governor of the State of Iowa to said commissioner to take up plaintiff's list of lands for examination? If so, produce the letter or copy thereof filed by them before said commissioner at that time.

2. Did said defendant, by its said attorneys, appeal from the decision of said Commissioner; and, if so, is the notice of appeal made a part hereof the notice served by them?

The defendant's attorney herein, I. N. Kidder, will answer the following interrogatories:

1. Did you have a conversation with Galusha Parsons at the city of Des Moines in the month of May, 1877, in which he informed you that court would be held in Buena Vista county on the first Monday of June, 1877?

2. Did you receive a letter from said Parsons written on the

thirtieth or thirty-first day of May, 1877? If so, attach the same to your answer hereto.

The defendant's attorney, G. S. Robinson, will answer the following interrogatories:

1. Did you in any way inform the court or plaintiff's attorney at the time judgment was taken herein that you were not fully authorized to appear in this action, or did you request any postponement thereof, or say that the defendant desired a continuance, or that it had not surveyed the lands? And state fully what you did say, and what said Parsons said to you, and your answer to the court when asked if you had anything to say why judgment should not be rendered.

2. Produce your letter-book containing the letter or a copy thereof referred to in defendant's petition for a new trial as having been written by you to Mr. Kidder on the tenth day of June, 1877.

3. Produce all letters received by you from Mr. Kidder or the officers of the Iowa Railroad Land Company in respect to said judgment and your answers thereto, or copies of the same.

GALUSHA PARSONS,
Plaintiff's Attorney.

EXHIBIT "A."

Headed—"A list of the swamp and overflowed lands situated in the county of Buena Vista, and State of Iowa."

Here follows a description, among others, of all the lands claimed in plaintiff's original petition, as printed as Schedule "A" of this abstact, in the following form:

PARTS OF SECTIONS.	Sec.	Town.	Range.	Acres.	REMARKS.
Sw ¼ of ne ¼	3	90	36	40	Swampy prairie.
Se ¼ of sw ¼	13	90	36	40	½ to 2 ft. overflown by Raccoon fork.
Se ¼ of se ¼	11	93	38	40	1 to 3 ft. overflows by Little Sioux river.

So much of this list as describes the lands claimed in the petition is printed in Schedule "A" above referred to. At the end are the following affidavits:

STATE OF IOWA, }
Webster Cunty, } *ss:*

We, George S. Ringland and W. H. Hait, having been appointed by the county judge of Buena Vista county to select the swamp and overflowed lands in said county, do solemnly swear that we understand and have examined the lines bounding each of the tracts of land particularly designated in the foregoing list, and we do further solemnly swear that the greater part of each and every forty-acre tract or smallest legal subdivision therein named is swamp and

overflowed land and of the character embraced in the act of Congress approved the twenty-eighth day of September, 1850.

G. S. RINGLAND.
W. H. HAIT.

Sworn to and subscribed before me, this seventeenth day of December, A. D. 1859. Witness W. P. Logan, clerk of the district court of Webster county, Iowa, and the seal of said court affixed, this seventeenth day of December, A. D. 1859, at Fort Dodge, in said county and State.

[L. S.] WM. P. LOGAN, *Clerk D. C.*

STATE OF IOWA, }
Dubuque County, } ss:

I, Zachariah Tucker, having been appointed by the county judge of Buena Vista county to select the swamp and overflowed lands in said county, do solemnly swear that I understand and have examined the lines bounding each of the tracts of land particularly designated in the foregoing list, and I do further solemnly swear that the greater part of each and every forty-acre tract or smallest legal subdivision therein named is swamp and overflowed land and of the character embraced in the act of Congress approved twenty-eighth of September, A. D. 1850.

ZACH. TUCKER.

Sworn to and subscribed before me, this thirtieth day of January, A. D. 1860. Witness J. F. Bates, clerk of the district court
47 of Dubuque county, Iowa, and the seal of said court affixed, this thirtieth day of January, A. D. 1860, at Dubuque, in said county and State.

[L. S.] J. F. BATES, *Clerk,*
By WM. A. RUPERT, *Deputy.*

STATE OF IOWA, }
Black Hawk County, } ss:

I, J. W. Tucker, late county judge of Buena Vista county, in the State of Iowa, do solemnly swear that George S. Ringland, Zachariah Tucker, and W. H. Hait, were duly appointed by me while county judge of said county of said Buena Vista, as agents to select the swamp and overflowed lands in Buena Vista county aforesaid, and that the agents aforesaid are reliable and responsible men; and I do further swear that the within is the original report of said agents, and that the correctness of the report has been sworn to by the said agents, as will more fully appear by the affidavits hereto attached, the reason that I do not certify said report is that since employing said agents I have removed from said county of Buena Vista to the county of Black Hawk in said State; so help me God.

J. W. TUCKER.

Sworn to and subscribed before me, this twenty-sixth day of December, A. D. 1859. Witness J. B. Severance, clerk of the district

court of Black Hawk county, Iowa, and the seal of said court affixed, this twenty-sixth day of December, A. D. 1859, in said county and State.

[L. S.] ——— ———.

STATE OF IOWA, STATE LAND OFFICE.

I hereby certify that the foregoing report of the swamp land selections in Buena Vista county is recorded in this office in book "B," pages one hundred and ninety-three to two hundred and twenty-eight, inclusive.

J. B. MILLER, *Register.*

18 EXHIBIT "B."

Report of J. A. Harvey, Commissioner, to the Governor of Iowa, March 14, 1872.

SIR: When I reported to your predecessor in March, 1868, the condition of the claims of the State against the General Government under the swamp land grant, I thought that within two or three years all these matters might be adjusted. Confident of the legal rights of the State, I was only mistaken in supposing that the Interior Department could so easily be induced to execute the law. The great difficulty was to get a recognition of the "suspended lists," or "new selections," as they are sometimes called, as swamp selections. It was agreed between the State and the Department, soon after the passage of the act, that the State should select, by agents appointed for that purpose, the lands claimed as swamp and overflowed, and report them to the surveyor general. That officer was directed to examine all such lists of selections, and all evidence furnished by the State touching the character of the land, in connection with the field-notes of the Government survey, plats, &c., in his office, and report to the General Land Office, as swamp selections, such as, in his judgment from examination, came within the meaning of the grant. Such as he thus reported were then recorded in the tract-books in the swamp division of the General Land Office, and held as legitimate selections. In pursuance of this arrangement the State was still making and reporting her selections, and the Department receiving them till July 13th, 1860, when the Commissioner changed the construction up to that time given to the grant, and issued his instructions to the surveyors general, limiting the application of the grant to "lands contiguous to navigable rivers," and directing them not to return as selections any other lands. Some of our selections were at that time in the surveyor general's office not acted upon, and a number of our counties had not completed their selections, but did afterwards, and sent them to the surveyor general. All such, unless contiguous to the Mississippi or Missouri river, were by these instructions
49 prevented from being reported to the General Land Office, but were retained in the surveyor general's office at Dubuque. In September, 1860—two months only after the instructions were issued—on application of Senator Green, of Missouri, in a case from

that State, it appears that the Secretary of the Interior overruled the Commissioner's construction of the grant, and held that any land so wet as to be unfit for cultivation, either by reason of being swampy or overflowed, whether contiguous to rivers or elsewhere, came within the meaning of the grant. * * * Thus our selections remained in the office at Dubuque till 1866, when that office was discontinued. * * * When I made my report to your predecessor in 1868, I was confident that the State was entitled to have these received as legitimate selections, as it was no fault or laches on her part that they were not regularly reported by the surveyor general, but such failure to report was caused entirely by the error of the Commissioner of the General Land Office. I had too much confidence in the integrity of the Government to believe that, in a case fairly and fully presented, high public officers would persistently and wilfully refuse to discharge a legal duty; and that if they should, the case being so palpably just it would not be difficult to secure relief by an act of Congress. I have made repeated efforts to reach the desired end, but found it much more difficult than I expected. Selecting the list of selections of Buena Vista county as a test case, I applied to the Commissioner to take it up for adjustment. * * * Having at length followed the questions involved through all the Departments of the Government, established my construction of, and vindicated the rights of the State under, the swamp grant, in the two decisions of the Supreme Court of the United States before referred to, contested the adverse decisions and illegal rulings of the Commissioner of the General Land Office and Secretary of the Interior, and carried them to the highest and last resort, the President himself, and procured an act of Congress mandatory in its terms requiring the Commissioner to take up and adjust these claims, and allow the indemnity provided; in short, having got the obstructions removed, and the way opened for the prosecution of all these claims to final settlement, without any further delay than is necessary to give time to work up the proof, I am ready to give up the work and place in the hands of any one designated to take charge of it all papers and matters in my hands connected with the business proper to be turned over; and I will in a few days place in your hands my resignation. * * *

J. A. HARVEY.

Documents Appended to the Foregoing Report.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
April 29, 1869.

Hon. J. D. COX, *Secretary of the Interior.*

SIR: I have the honor to submit herewith two letters from Hon. J. A. Harvey, agent of the State — Iowa, of dates April first and fifth, respectively, relating to certain lands in Buena Vista county, Iowa, claimed by the State to be swamp lands, but which have never been regularly reported to this office as such. In order to a full under-

standing of the case I will state that in the State of Iowa the swamp selections under the grant of 1850 were by agreement made by agents appointed by the State, who, from examination in the field, made the selection of lands shown to be swamp. These selections were required to be filed with the surveyor general of that district to be by him revised. All tracts which, in the judgment of that officer, came within the intent and meaning of the grant were then placed in list form by the surveyor general, and after appending his official certificate, touching their swampy character, the lists were forwarded to this office. The practice has been to recognize only such tracts as were thus reported through the surveyor general. In the case submitted the State agents made selections in the county of Buena Vista and filed them with the surveyor general. None of the tracts contained in said list have been reported to this office by that officer. In 1866 the office of surveyor general at Dubuque was closed, and a part of the archives was sent to the
51 General Land Office. This list of selections made by the State agents was among others received here, and is the only documentary evidence we have of the claim of the State to the lands in question. There is no correspondence connected with it so far as this office is aware; and the only light thrown on the subject is a pencil note on the cover as follows: "Rejected for want of conformity to Commissioner's instructions of thirteenth of July, 1860." A copy of those instructions is herewith inclosed, from which it will be seen that the surveyor general was instructed to report, as swamp, those tracts only which were to be found in the vicinity of navigable rivers. As these lands did not come within this classification they were, as the pencil note indicates, rejected by the surveyor general. The instructions of thirteenth July, 1860, were, however, overruled by the Department in the Secretary's letter of September fifteenth, 1860, and it is now claimed by Mr. Harvey that these lands, so far as they remain undisposed of, should be received as legitimate swamp selections and be certified to the State accordingly. This question has been acted upon heretofore by this office in the case of Dickinson county involving the same point. In that case it was held that the established method of making swamp selections was through the surveyor general, and that the list in question was never reported by him, but came before this office by the removal of the archives of the surveyor general's office; that to receive them now would be in the nature of new selections from which we are barred by the limitations of the act of twelfth March, 1860,. U. S. Stat., vol. 12, p. 3. At the suggestion of the State agent the question is respectfully referred to the Honorable Secretary with the foregoing statement of facts and previous rulings of this office.

Accompanying this will be found—

1. Letters of Hon. J. A. Harvey of first and fifth April, 1869.
2. Original list found in the archives of the surveyor general's office.
3. Copy of instructions of thirteenth July, 1860.
4. Secretary's letter of September fifteenth, 1860.

52 5. Commissioner's letter to Hon. A. W. Hubbard in the case of Dickinson county.

I have the honor to be, very respectfully, your obedient servant,

JOS. S. WILSON,
Commissioner.

Hon. C. DELANO, *Secretary of the Interior.*

SIR: In the matter of the application to have taken up for adjustment the list of swamp land selections of Buena Vista county, Iowa, submitted for your consideration by the letter of the Commissioner of the General Land Office of April twenty-nine, 1869, I wish to add a few considerations to what I have already said in my letters of April one and five, 1869, to the Commissioner, in favor of taking up said list. Since this application was made some controverted points have been settled. It is now settled by the highest judicial tribunal of the nation that the act of September twenty-eighth, 1850, known as the swamp grant, was a present grant granting to the States all the lands that by reason of being swampy or overflowed were rendered unfit for cultivation; and that while it is made the duty of the Secretary to furnish the State with the evidence of title, still the right of the State depends not upon his action, but upon the grant, and cannot be defeated by his failure to discharge his duty. See R. R. *vs.* Fremont County, and R. R. *vs.* Smith, 9 Wallace, 89 and 95. These decisions, I say, have been made since I asked to examine and adjust this list, and, as it seems to me, leave no room for doubt as to the duty of the Department in the premises. If there are any swamp lands in this list, the State is entitled to them; and it is the duty of the Department to approve and patent them. The right to all such land is secured to us by the grant, and we demand it; the duty is by law enjoined upon the Department, and we insist on its performance. To ascertain the rights of the State as to these lands and the consequent duty of the Department, or, in other words, to ascertain what tracts in this list come within the meaning of the grant, that they may be approved to the State, it be-

53 comes necessary to make this examination, and I am unable to find a reasonable objection. If it be suggested that the State has not complied with the requirements so as to entitle her to have her lists received and examined, I answer she has complied strictly; she has not left a single duty unperformed. The selections were made by a competent surveyor acting under oath, according to express statute of the State, and also in pursuance of instructions from the General Land Office, and were returned to the surveyor general in the form and manner required by the Commissioner. I repeat that the State made these selections in strict compliance with the agreement which the Commissioner in his letter of April twenty-ninth, 1869, submitting the case, admits, authorized the selections in the State of Iowa to be thus made, and made, too, in like form and returned in the same manner as the other selections in said State, which the General Land Office has received and acted upon. However, as this objection is not raised by the Commissioner, I need say no more in regard to it. The General Assembly of the State of

Iowa, at its next session after the act of Congress of March twelve, 1860, adjourned on the eighth of April, 1862. The time for making swamp selections in Iowa terminated by that act, therefore, April eighth, 1864. The list was returned to the surveyor general on the eleventh of June, 1862. It was therefore done in time. Do you ask me where is the evidence? I answer, without having under my control the communication of the secretary of State accompanying the list, by referring to the affidavit and official certificate attached to the list, which fix the date of the completion of the selection. It is the selection, the picking out, and designating the tracts from the other lands that is mentioned in the act of 1860. It says nothing about the return of the list or its reception by the surveyor general or at the General Land Office. The act has reference to the selection to be made by agents of the State according to the agreement, as stated by the Commissioner in his letter in this case. Again, we find the list on file in the surveyor general's office, and the presumption arises that it was there legally and in due
54 time, which is strengthened by the annotation thereon showing it to be there, while he understood the Commissioner's instructions of the thirteenth of July, 1860, to be in force. He rejected the list and noted thereon the fact. He made no other objection. The land not lying contiguous to a navigable river, the list was, as directed by said instructions, rejected. From these facts we are bound to conclude that the selection was made in time, and also reported in time, if that be necessary. I insist, however, that the limitation of the act of 1860 only affects the time of making the selection by the State agent, and has no reference whatever to any act on the part of the Government. There is, therefore, no excuse on this ground; nor does the Commissioner make any such objection. But if it is deemed material to have positive proof as to the time this list was placed in the hands of the surveyor general by the State, then give us an opportunity and we will furnish it. The only objection urged by the Commissioner, as will be seen by his letter in this case, is this: "That to receive them now would be in the nature of new selections, from which we are barred by the act of March twelve, 1860." This phraseology is peculiar and, it seems, ambiguous. I am not certain of its meaning. Does the Commissioner mean that the reception of this list now would in any respect change its nature and make it different from what it is? It could not. Or, does he mean that to receive and act on this list now would be in effect permitting the State to make selections after the expiration of the time allowed by said act? Then his position is untenable. The State has not made new selections or any selections since the expiration of the time allowed, nor does she ask any such thing. The State simply asks to have the selections she has made in due time and proper manner examined and passed upon. This she was and is entitled to, and would long since have had but for the act of the Commissioner forbidding it. We have a right to complain of this act of the Commissioner. He was doubly at fault. His instructions of July thirteen, 1860, were in palpable violation of

rights under the grant, conceived in his antipathy to the swamp land interests, and clearly erroneous, as the Secretary soon after
55 decided. And when his instructions were overruled he neglected to notify the surveyor general or issue new instructions, thus refusing to carry out the views of the Secretary, but leaving his own erroneous rulings to work their damage to the swamp land interests. Thus time passed, the State supposing her lists were in process of adjustment; but the Commissioner having, by his said instructions of July thirteen, 1860, expressly directed the surveyor general not to report as swamp selections any lands not lying contiguous to navigable rivers, that officer could not report upon this list, but marked it rejected, under said instructions. These instructions had, prior to this time, been overruled by the Secretary, but the surveyor general was not aware of it. The Commissioner had not notified him of it, but left him to act under them still. Notwithstanding these facts, when we ask the Commissioner to take up the selections, he answers that they cannot be received because the surveyor general failed to report them. Too late. It would be making new selections. Who caused the delay? Who made it too late? Was it from any laches on the part of the State? The facts in the case are sufficient answer. Now, I ask, can the Commissioner plead the result of his own error to excuse him from the performance of a legal duty? Can rights granted by Congress be thus frittered away and utterly defeated by the error of a public officer? No lawyer will so contend. In the case of R. R. *vs.* Smith, 9 Wallace, 99 and 100, above referred to, the Supreme Court says, in regard to this case, "that the right of the State depends upon the grant and not upon the act of the Department, and cannot be defeated by the failure of the officer to do his duty." I do not see how the Department can act consistently with this decision and refuse to take up this list; to refuse to indorse the erroneous and unwarrantable action of the Land Office, and to carry into final effect the Commissioner's refusal to discharge his official duty. It is no answer to say that the courts will give us the land, and that we may resort to them. That is admitting the duty of the Department to do it. This branch of the Government, as well as
56 the courts, is organized for the purpose of executing the law, and it has no right to refuse, for the reason that the courts can correct the injury. It is a consolation to know that we have judicial tribunals, competent and incorruptible, to which even the humblest may resort for the protection of his rights, whether refused or assailed by legislative or executive power. Still it is not desirable to be handed over needlessly to expensive and vexatious litigation. But to return to the Commissioner's letter. It may be that he meant that by making out and approving a list from among these selections he would, in effect, be making new selections for the State after the time allowed by the act of March twelfth, 1860; or, to express it otherwise, that he understands the word selections, in the second section of said act of March twelfth, 1860, to mean the same thing as the terms list and plats, in the second section of the act of September twenty-eighth, 1850. If that be so, he has a

very erroneous idea of the act of 1860, as I will proceed to show. The language in the second section of the act of March twelfth, 1860, is that the selection to be made from lands already surveyed shall be made within two years from the adjournment of the Legislature of each State at the next session after the date of this act. * * * These lands had all been surveyed. Now, if selection in this act means the list and plats which the second section of the act of 1850 requires the Secretary to make out and transmit to the State, we have the act of 1850, making a present and absolute grant to the State of all the swamp lands, and requiring the Secretary to furnish the State with the evidence of her right in the shape of these lists and plats; and then the act of 1860 following, without any provision modifying or repealing the grant, and directing the Secretary that if he does not discharge the duty enjoined upon him by the act of 1850 by a certain time he shall not do it at all. Such a construction is unreasonable, and imputes to Congress inexcusable folly. It would place it in the power of a single officer to defeat the object of the grant, and render nugatory the rights of the State in violation of the principle of vested rights, and in opposition to the decision of the Supreme Court above referred to. 9 Wallace,
57 99 and 100. Again, the language of the act itself forbids such a construction. If the word selection in this act means the same as list and plats in the act of 1850, or, which is the same thing, refers to the action of the Department, why is any allusion made to the Legislature? What connection is there between this Department and the State Legislature that the Secretary in the performance of his official duty should be in any manner governed or restricted by the act of that body? The Legislature had nothing to do with the survey of the public lands nor any control over the Secretary; and if it was the intention of Congress by this act to limit the time for the performance of this duty by the Department, they would have fixed a certain time or given a certain time after the completion of the Government survey, and would not have made it depend on the adjournment of the Legislature. Having seen that this limitation in the act of 1860 has no reference to the action of the Department, let us see what it does apply to. We have no difficulty in coming to a correct conclusion if we take into consideration the action of the States and the practice of the Department up to that time in regard to swamp lands. In order to determine what lands should be approved and patented under the swamp grant, the Department permitted the State to adopt either of two methods submitted, to wit: To take the field-notes of the Government survey; or, if not satisfied to adopt them as the basis, then to make its selections by examination in the field by agents appointed for that purpose under the authority of the State. Prior to that time little attention had been paid by surveyors of the public lands to the true character of the lands, as to whether wet or dry. It was not deemed necessary. Nothing was thought to depend on it, and therefore the field-notes were known not to be reliable on this point. Hence only two or three of the States agreed to accept them as the test of examination. Iowa, with the other States, chose the other method,

and agreed to make its selections by examination in the field; and accordingly the "agreement" referred to in the Commissioner's letter in this case was made, and the State, by legislative enact-
58 ments, proceeded to carry out this agreement, and made provision for making the selections. In the Commissioner's instructions of November twenty-one, 1850, we have the origin of the term "selection" as applied to swamp lands. See Lester's L. L., 544. It does not occur in the act of 1850, nor in the act of March second, 1855, but the act of March third, 1857, confirming the swamp selections, adopts the term, and with the same meaning that the Commissioner gave it in his said instructions. In said act of March third, 1857, the words "selection of swamp and overflowed lands * * * heretofore made and reported to the General Land Office" could hardly mean lists made out by the Commissioner, nor can they consistently refer to any act on the part of the Department. But they refer to and mean the selections which the Department agreed the State should make by its agents, the selections which the State had thus made and reported to the General Land Office for examination and final action. In the act of March twelfth, 1860, Congress agaid used the word in the same sense. Congress knew the States were making selections by their own agents, by agreement or in pursuance of instructions of the Land Office, and evidently meant the selections being thus made. And by the terms "selections" and "swamp selections" we are bound to understand the lists of land picked out and designated as the tracts claimed by the State under the swamp grant. And when we remember, also, that the States Iowa, Missouri, and several others had granted the swamp lands to the counties and authorized them to make the selections by agents appointed under the law of the State; that in some cases counties were still unorganized, as were some in Iowa, and not in a condition to make their selections; and that some were so new and sparsely settled as to occasion great delay, and consequently the selections were being returned so slowly as to indicate that a long time would elapse in closing up the grant, we see the object of Congress in this second section of the act of March twelfth, 1860. To hurry up selections and bring the administration of the grant to a reasonably speedy conclusion, a time must be fixed beyond which selections cannot be made; but to make any necessary provision on
59 the part of the States, the Legislatures must have time to act in the matter. Hence this section limits the time to two years after the adjournment of the next session of the Legislature, giving opportunity for any necessary legislative provision, and then two years more to examine the land and make the selections. In view of this act Iowa did make the necessary legislative provision for selections in her unorganized counties, and they were all completed and reported to the surveyor general within the time allowed in this act of March twelfth, 1860. From these considerations I insist that Congress by "selections" meant the selections to be made by the State agents; that the restriction has no reference to any part of the Government; that it does not relate to nor restrict the Secretary or Commissioner in listing or approving these lands,

nor limit them in the performance of any official duty; and that while the States cannot continue to make selections, still the Department must continue to examine and adjust selections already made, till the work is completed. If I am right in this, and I see no room for doubt, then the Commissioner was in error, and we are entitled to have this list examined and the remaining undisposed-of swamp and overflowed land therein approved to the State. There is but one thing that has ever, so far as I am aware, been suggested as affording any excuse for refusing to take up this list; that is, "the previous practice of the Department." On this point I have to say:

1st. If it was the "established method" to make selections through the surveyor general, it cannot be done in this case now. The Commissioner himself prevented these selections from appearing here in accordance with that "established method." Had it not been for the express order of the Commissioner forbidding it, these selections would have been reported by the surveyor general, and the State would have been spared this vexatious delay of nearly nine years, during which time nine-tenths of the land embraced in the list have been disposed of, and, so far as the Government can do it, placed beyond the reach of the State. If the Commissioner had notified the surveyor general of the overruling of his instructions of July thirteenth, 1860, as he should have done, there was ample time for him to report on this list. But he did not; and now I say, under the facts of this case, to interpose this objection is on principle to justify a man in pleading his own wrong, and to defeat great public and private rights by interposing the laches of a single ministerial officer, either of which would not be tolerated for a moment by any respectable judicial tribunal in the country.

2d. The office of surveyor general is under the control of the Commissioner of the General Land Office. In fact, by law, where there is no surveyor general, the Commissioner is *ex officio* himself surveyor general; and every surveyor general is at all times subordinate to the Commissioner, under his supervision, and subject to his orders. Now, bearing this in mind, and also the fact that the acts of Congress relative to the swamp grant make no allusion to the surveyor general; that the requirement to report swamp selections to him is no part of the law, but simply an order of the Commissioner with a view to relieve him of some of the burdens imposed in the administration of the grant, it must be conceded that whenever the selections were deposited in the surveyor general's office they were in contemplation of law reported to the Commissioner of the General Land Office. They were placed in the hands of his subordinate, the one by him designated, and were thenceforward under the control of the Commissioner, to be examined, reported on, etc., as he might direct; but the State had no further control over them; she had done all she could. Now I submit, with all candor and due respect, whether it is not unreasonable in this case to raise such objection? The obligation rested on the Commissioner to see that the selections of the State were acted on, and the transfer of the duty to the surveyor general did not relieve him

from the obligation; he was bound to see the duty performed. If errors were committed he should see them corrected as far as possible, and if any duty is left undone he should order it done, and has the right to step in over the surveyor general and do it himself, and more especially where the duty is one
61 that the law as in this case imposes upon him. Hence, if the surveyor general failed to report the list, it does not release the Commissioner from the duty of examining it. If the surveyor general neglected to examine the list and report the lands falling to the State under the grant, the Commissioner is legally bound to do it, and there is no legal restriction as to when he shall perform that duty. On this point I say finally that the Department has no right to make "requirements" or have "established methods" or establish a "practice" that can be used to defeat the administration of the law; and certainly an officer has no right to set up his own arbitrary ruling, however well established by the official practice, to evade the discharge of a legal duty, and thereby defeat rights granted by positive statute. The Supreme Court, in speaking of the rights of the State under this same grant, 9 Wallace, 99, 100, says: "The right of the State did not depend on his (the Secretary's) action, but on the act of Congress; and though the States may be embarrassed in the assertion of this right by the delay or failure of the Secretary to make out lists of these lands, the right of the States to them could not be defeated by this delay." In the decision from which the above is quoted and the one immediately preceding it the Supreme Court has as before stated settled the controlling points in this case. Whatever doubt there may have been before, there can be none now as to the duty of the Department. It always should be and doubtless generally is the aim of public officers so to discharge their official duties as to secure to all interested their legal rights; but for a number of years the General Land Office has presented an exception to this rule. The action of the Commissioner has been most unfriendly in the administration of this grant. His object has not been to facilitate the adjustment, but to throw every conceivable obstacle in the way; and thus in this case as well as in others the matter has been deferred till nearly all the land has been disposed of. But now I indulge a hope that we have seen an end to such quibbling; and that instead of quarreling with acts of Congress and seeking to modify or defeat them by arbitrary rulings and established
62 methods of practice, the design will be with reasonable dispatch to execute the laws in their true intent and meaning, thus securing to all interested, so far as it can now be done, their legal rights in the administration of the grants. With such a spirit in the Land Office the swamp grant would long since have been closed up. It has been delayed for years by the unjustifiable course pursued by the Land Office, and great loss and damage have thereby occurred to the State and her grantees that cannot now be remedied; but we insist on being spared the result of further delay; and I am quite certain no good reason can be given for not proceeding with the examination demanded. The claim of the State to the lands is not admitted by taking up the list. What I ask is that it may be

examined by any test the Department may see fit to apply, only let it be one that will with reasonable certainty find the true character of the land, and that whatever lands are thus found to be of the character contemplated by the swamp grant and remaining undisposed of be approved to the State. These will comprise a very small part, not more than one-tenth of the list. As to lands disposed of, I admit the Department has no further control; the remedy is in the courts. But as to those undisposed of, spare us further complications resulting in expensive litigation, and the ruinous consequences of further delay. Trusting that you will find it consistent with your official duty to instruct the Commissioner to place in process of adjustment the list referred to,

I have the honor to be, most respectfully, your obedient servant,

J. A. HARVEY,
Commissioner for Iowa.

Washington, D. C., March 24, 1871.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Oct.* 23, 1871.

SIR: I have considered the appeal of The County of Buena Vista, State of Iowa, from the decision of the Commissioner of
63 the General Land Office, relating to swamp lands claimed by that county. The first session of the Legislature of the State of Iowa after the passage of the act of March twelfth, 1860, adjourned on the eighth day of April, 1862. There is no proof that the list of selections made by said county was filed in the office of the surveyor general within two years from the time of the said adjournment, and for that reason I affirm the decision made by the Commissioner.

Very respectfully, your obedient servant,

C. DELANO, *Secretary.*

Hon. WILLIS DRUMMOND,
Commissioner General Land Office.

Hon. C. DELANO, *Secretary of the Interior.*

SIR: I have to call your attention to the subject of your decision of October twenty-third, 1871, to wit, the list of swamp selections of Buena Vista county, Iowa, again; and to ask that you so modify your decision as to return said list to the Commissioner with instructions to place it in process of adjustment upon the State's furnishing satisfactory evidence that said list was placed in the office of the surveyor general prior to the expiration of the time for making such selections, as indicated in your letter of October twenty-third, 1871, in said case to the Commissioner. And in support of this motion I beg leave to say that the truth is, as stated in my argument previously presented, that this list was in the surveyor general's office for nearly two years before the expiration of the time for making swamp selections in Iowa, and the Commissioner himself was fully advised and satisfied of that fact. The surveyor, in his annual report to the General Land Office, dated October first, 1863,

shows that lists of such selections were accumulating in his office which could not be acted upon under existing instructions. Land Office Rep., 1863, p. 59. And the same fact is referred to in his report of 1864. Land Office Rep., 1864, p. 57. And again in 1865 he shows that such lists are still in his office, and the State
64 agents frequently writing to know why they are not acted upon. Land Office Rep., 1866, p. 71. Again, in 1866 the Commissioner went to Dubuque for the purpose of closing the office, and saw the surveyor general and directed what documents and papers should, under the law, be turned over to the State and what should be transmitted to the General Land Office. This list with others was by his direction transmitted to his office and remained under his control. Under these circumstances and with his knowledge of the facts the Commissioner did not base his action on the ground that the list was not returned by the State agent in time, but on the ground that the surveyor general had not reported them to his office in the ordinary way. If he had based his decision on the same ground as did the Hon. Secretary, we would have been permitted to supply the proof found wanting, although it would be requiring the State to furnish by parol testimony what ought to appear officially in the surveyor general's office. When the list was reported as required the State could do no more with it, and had a right to expect the officers of the Government to do their duty. They should have made the time of its reception and their action thereon a matter of record. Whatever may be our opinion as to the propriety of requiring us to furnish this proof under the facts in this case, and after such a lapse of time, we do in view of the decision of the Hon. Secretary ask permission to do so. When the application to take up this list was made to the Commissioner we had no reason to suppose that we would be required to furnish this proof, and the Commissioner did not require it. In view of this fact and the further facts that in my argument submitted on the twenty-fourth of March, 1871, I did ask that we be permitted to furnish the proof if positive testimony should be found necessary—I say, in view of these facts, this application certainly will not be denied. The State authority of Iowa, State officers composing the census board, after full consultation and consideration, construe your decision as expressed in your letter of October twenty-third, 1871, to the Commissioner to be an overruling of the objections raised by the Commissioner, which could not be sustained under the recent
65 decisions of the Supreme Court, to which your attention has already been called, and that if the proof we now ask permission to furnish had been in, the application would have been granted. Believing this is the correct construction of your letter and acting under their direction, as well as by legislative authority of the State, I submit this motion and ask that it may be considered and passed upon as soon as possible.

Very respectfully, your obedient servant,

J. A. HARVEY,
Agent for Iowa.

Washington, D. C., January 6, 1872.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Feb.* 2, 1872.

SIR: I transmit herewith a communication addressed to the Department on the sixth ulto. by J. A. Harvey, agent, for a modification of my decision of the twenty-third of October last, in the matter of the swamp lands of Buena Vista county in said State; also another from him under date of yesterday calling attention to the first-named letter. I must decline acceding to Mr. Harvey's request, and you will please to so inform him.

Very respectfully, C. DELANO, *Secretary.*

HON. WILLIS DRUMMOND,
Commissioner General Land Office.

"K."

A Bill for the relief of Lucas, O'Brien, Dickinson, and other counties in the State of Iowa.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of the General Land Office is hereby authorized
66 and required to receive and examine the selections of swamp lands in Lucas, O'Brien, Dickinson, and such other counties in the State of Iowa as formerly presented their selections to the surveyor general of the district including that State, and allow or disallow said selections and indemnity provided for according to the acts of Congress in force touching the same at the time such selections were made, without prejudice to legal entries and rights of *bona fide* settlers under the homestead or pre-emption laws of the United States at the date of this act.

EXHIBIT No. 1.

STATE OF IOWA, STATE LAND OFFICE,
DES MOINES, *April* 21, 1875.

S. S. BURDETT,
Commissioner General Land Office, Washington, D. C.

SIR: In the years 1859–'60 Buena Vista county, Iowa, made its selection of swamp and overflowed lands, and filed its lists of selections in this office, which were duly forwarded to the surveyor general, and which have not yet been acted upon; you are therefore requested to take the necessary steps for the adjustment of the swamp land claims of said county, under the provisions of the act of March fifth, 1872, at the earliest practicable day, to the end that said claims may be finally adjusted and settled.

Very respectfully, DAVID SECOR,
Register Iowa State Land Office.

I concur in the foregoing request.

C. C. CARPENTER,
Governor of Iowa.

67

EXHIBIT C.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,
WASHINGTON, D. C, *July* 7, 1875.

W. F. STEIGER, Esq.,
Agent of Iowa Railroad Companies, Washington, D. C.

SIR: Your letters of May eighteenth and twenty-first, 1875, have been received; also that of May twentieth, 1875, enclosing printed argument of Hon. James F. Wilson, of Fairfield, Iowa, attorney for certain railroad companies in reference to the investigation of the swampy character of certain lands which have been certified to said companies, but which are claimed by the state as swamp lands, and in reply thereto I have to say: That if the lands in question have been certified to the railroad companies before the right under the swamp grant attached no examination or inquiry would be made; nor will this office further inquire with regard to the correctness of any decision made heretofore in cases where the swampy character of any tract or tracts of land has been already investigated and that question decided; but in cases of hasty or inadvertent action, where the rights or claims of parties have been overlooked and not examined, such parties have the right to be heard. This office, with the approbation of the Secretary of the Interior, has further examined numerous cases in which patents have been issued erroneously, both to individual purchasers and to railroad companies as claimants under land grants, although no ground of fraud was alleged, and when such error appeared the patentee has been duly notified thereof and requested to relinquish his apparent title, and upon his refusal or neglect to do so a patent has issued, notwithstanding such neglect or refusal, to the party found to be entitled thereto, reciting in such second patent the fact of the former erroneous or inadvertent patenting. Very notable cases of such second patenting have recently occurred in regard to lands in California, some of which may be mentioned. By act of Congress,

68 Revised Statutes, section 2488, second clause, all lands which had been segregated by the State as swamp lands by survey, in accordance with the United States system of surveys, in townships before that time surveyed, were confirmed to the State, saving the rights of settlers and others, and the United States surveyor was required to examine the State segregation maps and surveys, and when he found them thus to conform to the United States system of surveys, to construct and approve township plats accordingly, and forward to this office for approval. The surveyor general neglected this duty for several years, and in the meantime part of the lands which had been thus segregated were claimed by railroad companies under land grants made by acts of Congress, and were regularly listed and patented to such companies under the direction of this office. Many of these cases have been examined within the past three years, and others are now undergoing examination, and whenever it is found that the railroad company has not acquired its right prior to the act of Congress under which the State claimed the land by virtue of the swamp segregation, such company is notified to

surrender its patent, and after a reasonable time given to comply therewith, another patent is issued to the State reciting therein the fact of the prior patenting to the railroad company; several such patents have been already issued, and others are in course of preparation. When the first list of said lands was sent to the Secretary of the Interior for his approval, the attorney for the railroad company presented his protest before the Secretary, relying upon the same course of argument presented by you in this case, that the land having been certified to the railroad company was beyond the jurisdiction of this office or of the Department; but, notwithstanding such protest, the Secretary approved the list. The only difference between the California cases and those in Iowa, now under consideration, is in regard to the question to be settled. In California the matter to be inquired into is whether the lands were segregated by the State as swamp in a certain manner and prior to a certain date. In Iowa the question to be decided is whether on the twenty-eighth of September, 1850, the lands were swamp or overflowed within the meaning of the act of Congress granting swamp lands to the
69 States. I am aware that some of my predecessors in office refused to issue such second patents even in the clearest cases of error, unless the first patentee relinquished his patent and reconveyed the land, but the right and the duty to issue such second patent when the issue of the first was erroneous is not now questioned. Such action may appear to be in conflict with some of the views expressed by the Secretary of the Interior in his letter of February twenty-eighth, 1860, quoted and relied on by you, and which you say has never been revoked or modified by any of his successors, and is, therefore, still in force. There are various ways, however, of modifying an opinion expressed by the Secretary, or by any other officer; it may be as effectually done and a different rule established by a contrary practice as though overruled in terms. You quote from the Secretary's letter before named the following sentence: "When the Department by its officers has fully executed one grant its officers should cease all action under another grant of the same land to the same grantee." This you insist is decisively against the right of this office now, or at any time since the certification of the lands in controversy to the company, as inuring to their grants to again exercise its executive jurisdiction over them for any purpose, and especially with a view of eventually listing them to the State, if found upon the proposed examination to be swamp lands. I find no ground for questioning the correctness of either the policy or principle couched in the language of the quotation. I fail, however, to perceive its applicability to the matter in hand. To make the language of the Secretary effective of the ends of the companies, it is necessary to hold that there was a grant of these lands for railroad purposes, but this is the essential point of denial on which the proposed action of the office is to be had; for it is held that if, on the twenty-eighth day of September, 1850, the lands were swamp or overflowed, they became vested, were granted to the State by the act approved on that day, Revised Statutes, Sec. 2479, and that henceforth Congress was powerless either to resume the grant or to divert

it to any other use. It follows that the action of this office in
70 certifying the lands in question to the companies was not action under a grant, but a mere mistake, which, however it may seem to impugn its care in the execution of its functions, must not be allowed to stand in the way of the due discharge of a present duty. The suggested hardship upon purchasers from the railroad companies incident to a disturbance of their present titles by the proposed investigation has but little relevance to the question now before this office. The fact, however, remains that the swamp-land act carried over to the State a present grant, and that each tract of land carried to the companies and to their grantees testimony upon its face identifying it as the land of the State under the grant, or that of the United States subject to Congressional control. The land being thus granted to the State, the act of Congress granting the same imposes certain duties on the Secretary of the Interior, to wit: To make accurate lists and plats of all such lands, and transmit the same to the Governor, and, on the request of the Governor, cause patents to be issued to the State. The Secretary must necessarily perform this duty through his subordinates, and soon after the passage of the swamp grant by Congress a plan was adopted, on consultation with the State authorities, for making this examination. In Iowa the State undertook the selection of the land and the presentation of proof of its swampy character to the surveyor general, the ultimate determination of the matter being reserved to the Interior Department. The State has long since claimed the lands as swamp lands, and furnished *prima facie* evidence that they are of that character. This claim has not yet been examined by this office, and until it is so examined and either rejected or approved, the duty of this Department is not performed. Neither is it excused from this duty because the General Land Office has hastily or inadvertently certified the land to another claimant. The fact that such certification was nominally to the State for certain railroad companies does not change the matter. It was not granted for such railroads if the land is swamp, and such certification is erroneous, the same as if it had been made to the railroad companies directly. The Supreme
71 Court of the United States, in December, 1869, in case of the Hannibal & St. Joseph Railroad Company *vs.* Smith, error to supreme court of Missouri, declared that it was the duty of the Secretary of the Interior primarily to decide the question of the swampy character of the land, and then held that when the Secretary had failed to discharge that duty it was proper for the court to make the inquiry. The duty, then, of ascertaining the fact whether the land is, or is not swamp belongs primarily, as declared by the Supreme Court, to the Interior Department. That Department makes the inquiry through this office, and though the suggestion that the General Land Office is overburdened with its numerous and intricate duties may seem to excuse the delays and mistakes with which it is sometimes chargeable it cannot excuse a refusal to discharge a plain duty. The taxing of these lands and its effect on the title under the laws of the State is a matter in regard to which it is not the province of this Department to inquire.

struction of certain railroads have passed beyond the jurisdiction of this Department.

Particular attention is called to the grant made by the act of Congress approved May fifteenth, 1856, 11 Stats., page 9, and I will consider it and the acts of the State thereunder upon the first objection urged. By said act there was granted to the State of Iowa, to aid in the construction of certain lines of railroads therein mentioned, every alternate section of land designated by odd numbers for six sections in width on each side of said roads. It was further provided that if at the time the lines or routes of said roads were definitely fixed the United States had sold any of the lands so granted, or if the right of pre-emption had attached to the same, that other lands should be selected in lieu thereof by agents appointed by the Governor of said State, subject to the approval of the Secretary of the Interior. This grant the State of Iowa, by an act of her General Assembly, dated July 14, 1856, accepted upon the terms and conditions therein specified, and by the same act granted said lands to the several roads therein mentioned. After the lines and routes of the several railroads mentioned in the act of July 14, 1876, aforesaid, became definitely fixed, the State, through her duly authorized agent, pro-
75 cured the lands inuring to said grant, including the lands in question, to be certified to her, and then transferred them to the companies entitled thereto respectively. It further appears that the State by act of her General Assembly authorized the said companies to make such disposition of said lands, by mortgage or deed of trust, as might by them be deemed proper, in order to secure means to aid in the construction of said roads, and that they were mortgaged for that purpose. It further appears that the State has insisted on her right to tax said lands as the property of the respective railroads, since they were transferred to them for State, county, and all other purposes, which taxes the companies have been compelled to pay. In view of the facts thus appearing, I am of the opinion that the objection is well taken. A State may be estopped by her own acts or the acts of her authorized agents. Com. *vs.* Andre, 3 Pick., 224; Bransen *vs.* Wirth, 17 Wall., 42; Nieto *vs.* Carpenter, 7 Cal., 528; Bigelow on Estoppel, 246. Upon the question raised by the second objection, I am of the opinion that the rule laid down by Secretary Thompson in his decision of February eighth, 1860, that when the Department has fully executed one grant, its officers should cease all action under another grant of the same land to the same grantee, should be followed in this and all similar cases. While I am not prepared to admit that the Department loses jurisdiction to act in every case where lands have been certified or patented, I am of the opinion that it should be exercised only in extreme cases, where without its exercise the party entitled to the land would be remediless. The reason for this rule is clearly stated in the decision of my predecessor in the case of Latimer *et al. vs.* the B. & M. River R. R., Copp's Land Laws, page 403. It is of the utmost importance that titles given by the Department should rest on a firm and substantial basis; that they should be accepted and recognized as final adjudications

by the Department of the rights on which they are founded; that persons holding them should be secure in their possessions, and the public generally should have confidence in their stability. If the State of Iowa had any rights to the lands now claimed by
76 her which she has not granted or forfeited, she has a complete remedy therefor in the courts, without the aid of this Department. You call attention to the act of March fifth, 1872, 17 Stats., p. 37, and hold in effect that lands certified to railroads are not excluded from the operation of that act. The act defines your duties as to certain lands without prejudice to legal entries, etc. You hold that the word entry means a purchase with money or a location under or by virtue of some kind of warrant or scrip. It undoubtedly has the meaning you give it, but I think, as used in said act, it should have a more general meaning, and be construed so as to include any and every lawful appropriation of lands. Lands certified to railroads in accordance with the terms of the grant are thus appropriated. In my opinion this act does not prescribe any duty to be performed in connection with the lands in question. After careful examination of the questions presented in this case I am of the opinion that no examination or certification of the lands in question should be made, and I therefore reverse your decision, and herewith return the papers transmitted with your letter "K," of October fifth, 1875.

Very respectfully, CHAS. T. GORHAM,
Acting Secretary.

To the Commissioner of the General Land Office.

And immediately upon the filing of said answer the defendant filed a motion as follows:

(Title of the Cause.)

Comes now the defendant and moves the court that the answer of plaintiff to defendant's application for a new trial be struck from the files, and that an order for a new trial be entered, and for cause says:

1. That this application is brought under sections 3268 to 3272, inclusive, of the Code of Iowa; that defendant's application is verified and supported by affidavits, and under the statutes aforesaid no answer to said application and no trial in re-
77 spect thereto are allowed, and said matter is to be heard upon the application of the defendant and upon the showing alone made therein.

2. That the supreme court of the State of Iowa by its opinion and decision now on file in this court, upon appeal from the ruling of this court sustaining plaintiff's demurrer to the application of defendant for a new trial, has determined that said application is sufficient and this court should have granted a new trial therein, and this case upon said application is now here only for the purpose of having an order for a new trial entered in accordance with the decision and opinion of the supreme court.

3. That plaintiff, by its demurrer to the application of the defendant for a new trial, admitted the truth of the matter stated in said application, excepting only to the sufficiency thereof; that upon appeal the supreme court of Iowa by its opinion and decision now on file herein, has determined that said application was and is sufficient, and that this court should order a new trial therein; and the plaintiff cannot now be heard to contradict or take issue with the matters stated in said application.

E. S. BAILEY,
I. N. KIDDER,
G. S. ROBINSON,
Attorneys for Defendant.

And upon the following day, to wit, May twenty-second, the court announced its decision sustaining said motion, and directed an order to be entered in the following words, to wit: "And now, on this twenty-second day of May, A. D. 1879, this cause coming on to be heard upon the defendant's motion to strike answer of plaintiff from the files, the motion is sustained and a new trial ordered upon the application of defendant upon the defendant's paying the sum of two hundred and fifty dollars as the attorney's fee of plaintiff upon the first trial of this cause, and the further sum of three dollars and fifty cents, the balance of the costs of the former trial of this cause remaining unpaid, the said sums of money to be paid into court within ten days."

78 To which ruling, both as to striking out said answer and to ordering a new trial, the plaintiff then and there duly excepted, and immediately by the service of the proper notice appealed therefrom to the supreme court.

And thereupon the plaintiff filed a motion as follows:

[Title of the Cause.]

Now comes the plaintiff and moves for leave to controvert the allegations of defendant's petition for a new trial herein by affidavits, depositions, or oral testimony, or in any way that the court may designate, offering to disprove in such way as may be directed by the court as to the method of controverting the same every material allegation of said petition, and to show that the defendant's attorney, I. N. Kidder, was fully informed as to the time of holding said court, and that the same would begin on the 4th day of June instead of the fourteenth of June, and that the defendant and its attorney made no appearance at said term expressly for the purpose of the more certainly and easily procuring a continuance of said action.

GALUSHA PARSONS, *Attorney.*

Which motion the court denied, and the plainfiff duly excepted.

And the defendant afterwards on the same day brought the said sums so ordered to be paid as aforesaid into open court, and the

clerk of the court thereupon paid to Galusha Parsons the said sum of two hundred and fifty dollars and took his receipt therefor, which is made a part of this abstract and marked Exhibit No. 1, and the remaining sum is now in said court.

And thereupon the defendant filed an additional and supplemental answer and counter claim as follows:

[Title of the Cause.]

The said defendant, by leave of the court first had and obtained, files this its additional and supplemental answer and counter claim and thereupon alleges:

79 1. That the several parcels and tracts of land mentioned and described in the petition and all of them were listed and assessed to said defendant by said plaintiff and its proper officers for the purpose of taxation for the year 1872, and for each and every year subsequent thereto, including the year 1878, and the taxes for State, county, and other purposes were levied by said plaintiff and its proper officers upon each and all of said tracts of land for the year 1872, and for every year subsequent thereto, including the year 1878, which said taxes so assessed and levied have been paid by said defendant; that a particular statement of the taxes so levied and paid on each tract for each year with the times of payment thereof is hereto attached marked Exhibit A, and made a part of this answer.

2. That said lands were patented by the State of Iowa to the defendant as alleged in the answer herein in the year 1871, and said defendant has at all times since claimed the same under said patents and the acts of Congress and of the Legislature before referred to; that defendant had never entered into the actual occupation and possession of said land, and did not learn the actual condition and character of the same, whether the same were wet, swamp or overflowed, or not until after the filing of the answer herein; that this defendant always supposed and believed that said lands were dry and fit for cultivation without drainage; that since the filing of the answer and in or about the month of June, 1877, it caused a careful examination and survey to be made by competent surveyors in order to ascertain the quality and condition thereof, and upon the completion thereof it was first known that any particular tract was wet, swamp, and overflowed; that a large portion thereof is dry land, but that some portions and tracts thereof, but this defendant cannot now state with exactness and certainty what particular portions and tracts are wet and overflowed; and the defendant further alleges that each and every tract of said lands which are of the description specified in the said act of Congress approved September twenty-eighth, 1850, and which by reason thereof, and by force of the said act of Congress, and of the General Assembly of Iowa,

80 were granted to said plaintiff, and which should be determined by this court in this case to belong to said plaintiff, was not liable or subject to taxation for any of the years for which the same were assessed as aforesaid, and that the said levies of taxes and said taxes taxed for the years 1872 to 1878, both inclusive, were and each of them was and is illegal, erroneous, contrary to law, and

that all of said taxes were erroneously and illegally exacted by and paid to said county by said defendant, and by reason thereof the said plaintiff has become liable to refund the same with interest. Therefore the said defendant asks that in the event that any tract or parcel of said land shall be by this court adjudged and found to be wet and swampy and overflowed as aforesaid, and shall adjudge and decree that the title thereof be granted and established in said plaintiff, it may then order, adjudge, and decree that the amount of said taxes so paid by the said defendant upon the said tracts or parcels of land, with the lawful interest thereon from the times of payment, be refunded and paid by said plaintiff to this defendant, and for such other and further relief as may to the court seem just and equitable.

E. S. BAILEY,
I. N. KIDDER,
G. S. ROBINSON,
Defendant's Attorneys.

Duly verified.

Exhibit A, referred to in and annexed to the foregoing answer, corresponds in words and figures with the defendant's schedule of taxes paid, as hereinafter printed.

The plaintiff thereupon and upon the same day filed a reply to defendant's answer as amended as follows:

[Title of the Cause.]

Now comes the plaintiff, and by way of reply herein, says:

I. It has not sufficient knowledge or information of the facts stated in said answer to form a belief.

II. For a further reply thereto it says that the said several
81 matters therein alleged are wholly foreign to the matters set forth in plaintiff's petition herein, and that the same cannot be properly made a matter of counter-claim to anything in said petition alleged, and are in no way connected therewith.

III. This division of the reply was literally the same as the second division of its answer to defendant's petition for a new trial printed upon page 49, with the exception of the formal portion in the first line.

IV. This was the same as the third division of plaintiff's petition for a new trial printed *supra*, page 41, except the formal portion.

V. This was the same as the fourth division of said answer printed *supra*, page 43.

All of the exhibits annexed to said answer and printed herein, beginning at page 45, were made a part of this reply.

And thereupon the defendant moved to strike said reply from the files as follows:

[Title of the Cause.]

I. Comes now the defendant and moves the court to strike from the files the reply of plaintiff to defendant's original answer filed

herein, for the reason that the same is irrelevant and immaterial and constitutes no matter of reply to defendant's answer.

2. And defendant moves to strike out the third paragraph thereof, because it is irrelevant.

3. And defendant moves to strike out the fourth paragraph, because it is irrelevant.

4. And defendant moves to strike out the fifth paragraph thereof, because the same is irrelevant, the same matter being set forth in the petition, and constitutes no matter of reply.

5. And defendant moves to strike out Exhibits No. 1 and B, thereto attached—

1. Because the matters therein contained are irrelevant.

82 2. Because the said matters are redundant, being set forth in the petition.

3. Because the same are matters purely of evidence.

I. N. KIDDER,
G. S. ROBINSON,
E. S. BAILEY,
Defendant's Attorneys.

The court sustained said motion so far as to strike out division three of the reply and overruled it as to the remainder. To which ruling so far as it struck out said portions of the reply the plaintiff duly excepted.

And thereupon the plaintiff amended its petition as follows:

[Title of the Cause.]

The plaintiff amends its petition herein by inserting, at the end of paragraph five, "a copy of which list with the proofs thereunto annexed is herewith produced and made a part hereof, as the same is annexed to its reply herein." And the plaintiff further amends the sixth paragraph thereof by inserting, at the end of the first period thereof, "that notice of said application was duly given to the defendant's agents and attorneys by the said Commissioner, a copy of which is hereto annexed and made a part hereof, marked Exhibit A; that the said Van Deventer was the agent of this defendant, having charge of said lands, and as such agent." The plaintiff further amends the said sixth paragraph by striking out the last period thereof and inserting in lieu thereof "that on the day last aforesaid the said Commissioner decided to take up said list for examination, a copy of which decision is annexed to its reply herein, marked "Exhibit C;" and which plaintiff asks may be considered a part hereof. That defendant offered no evidence in opposition to said proofs and lists, but appealed therefrom upon the sole ground that the said Commissioner, had no jurisdiction to allow and certify the same; a

83 copy of which notice of appeal is hereto annexed, marked Exhibit B, and which plaintiff asks may be considered a part hereof; that the Assistant Secretary of the Interior upon said appeal directed the Commissioner to take no further proceedings in respect to the certification of said lands, a copy of which decision is annexed to

plaintiff's said reply, marked Exhibit E, and which plaintiff asks may be considered a part hereof. And the plaintiff further amends its petition by making each of the exhibits annexed to its reply herein a part thereof, and asks that the same may be considered a part hereof as fully as if annexed hereto. That said original list, a copy of which is hereto annexed, marked Exhibit D, after its removal from the office of said surveyor general, to wit, in the year 1866, at all times remaining on file in said office of the Commissioner of the General Land Office, open to the inspection of the said defendant and its agents and attorneys, and was, in fact, inspected by them at the time of plaintiff's said application, and prior to its said appeal.

GALUSHA PARSONS,
Plaintiff's Attorney.

Duly verified.

EXHIBIT A.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April* 17, 1875.

J. VAN DEVENTER, Esq.,
President Iowa Railroad Land Co., Cedar Rapids, Iowa.

SIR: In June, 1872, you were notified as follows: "You are hereby notified that all selections of lands by the State of Iowa, under act of September twenty-eight, 1850, known as the swamp grant, are about to be taken up and examined with a view to certifying the same to the said State under the provisions of said act, and that unless proper proceedings are instituted by you within ninety days from the date hereof to contest the claim of the State under the act above mentioned to such of said selections as are claimed by
84 the Cedar Rapids & Missouri River, Dubuque & Sioux City, and Iowa Falls & Sioux City Railroad Companies, under railroad grants, this office will proceed with such examination and certification as though no conflicting interests existed."

That notice, however, was intended to apply only to lands that had not been certified to the railroad, and the register and receiver were instructed to that effect; a large quantity of land, however, had been certified to the railroads, which is claimed by the State under the swamp grant. If such land is actually swamp land, it was absolutely granted to the State by the act of September twenty-eight, 1850, and did not pass under the railroad grant of 1856; and the certification of the same under the railroad grant was erroneous, and could not convey any title. In all cases where the claim of the State to said lands as swamp has not been examined by this office and rejected, it will now be so examined; and if the land is found to be swampy or overflowed within the meaning of the act of September twenty-eight, 1850, it will be approved as such. If you desire to present evidence to show that the land is not of the character contemplated by that act, you will have the privilege of doing so, and on application to the local land office the register and receiver will appoint a time for hearing, and inform you in regard to the notice necessary to be given to the State and those claiming under

it. Unless within ninety days from this date you shall thus institute proceedings to contest the claim of the State, the cases will be taken up and determined on the evidence already on file in this office, unless the State authorities desire to present additional evidence, in which case you will be notified of the time of hearing and permitted to rebut the same.

Very respectfully, your obedient servant,

S. S. BURDETT,
Commissioner.

Exhibit B, being defendant's notice of appeal, is printed *supra*, pages 72 and 73.

85 Exhibit C, being the decision of the Commissioner of July seventh, 1875, *supra*, page 67.

Exhibit D is plaintiff's lists of selections, hereinafter printed as Schedule A.

The defendant thereupon filed the following answer to the petition as amended:

[Title of the Cause.]

Comes now the defendant, and, for an answer to the matters plead by plaintiff as an amendment to its petition, says: That this defendant received the notice attached to said petition, and thereupon it appealed to the Secretary of the Interior from the order of the Commissioner of the General Land Office, in respect to the character of the lands certified to the State of Iowa under the act of Congress of May fifteenth, 1856, to aid in the construction of certain railroads, and by the Governor of said State by lawful authority patented to said railroads, which notice of appeal showing the parties appealing and the causes for appeal is attached to said petition. That said appellants, by their attorney, made an argument on said appeal before the Secretary of the Interior, which argument is attached to the deposition of Mr. Van Deventer on file in this case. That thereafter, on the twenty-fourth day of August, 1876, said Secretary made his decision in said matter embraced in said appeal, a true copy of which decision is hereto attached, marked A, and made a part hereof. And defendant further says that of the truth of no allegation in said petition as amended, or in the amendment to said petition, not herein or in the original answer to plaintiff's petition answered, admitted, or denied has this defendant knowledge or information sufficient to form a belief.

E. S. BAILEY,
G. S. ROBINSON,
I. N. KIDDER,
Defendant's Attorneys.

Duly verified by J. Van Deventer.

86 Exhibit A, annexed to the foregoing answer, is printed *supra*, page 73–76.

The cause was then by order of the court set down for hearing upon written evidence.

Such portions of the several statutes as were read by the respective parties are for convenience here printed.

The plaintiff gave the following evidence:

I. An act of Congress, as follows:

An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein the whole of those swamp and overflowed lands made unfit thereby for cultivation which shall remain unsold at the passage of this act shall be, and the same are hereby, granted to said State.

SEC. 2. And be it further enacted, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the Governor of the State of Arkansas; and at the request of said Governor cause a patent to be issued to the State therefor; and on that patent the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the Legislature thereof: Provided, however, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. And be it further enacted, That in making out a list and plats of the land aforesaid all legal subdivisions the greater part of which is wet and unfit for cultivation shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

SEC. 4. And be it further enacted, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated.

Approved September twenty-eight, 1850.

87 II. Instructions by the Commissioner of the General Land Office as follows:

GENERAL LAND OFFICE, *November* 21, 1850.

SIR: By the act of Congress entitled an act to enable the State of Arkansas and other States so reclaim the swamp lands within their limits, approved September twenty-eight, 1850, it is directed "that to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamps and overflowed lands made thereby unfit for cultivation which shall remain unsold at the passage of this act shall be, and the same are hereby, granted to said State."

1st. By the fourth section of this act it is directed that the provisions of it shall be extended to and their benefits conferred upon each of the other States of the Union in which such swamp and overflowed lands may be situated.

2d. And "that in making out a list and plats of the lands aforesaid all legal subdivisions the greater part of which is wet and unfit for cultivation shall be included in said lists and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom."

This act clearly and unequivocally grants to the several States those lands which from being swampy or subject to overflow are unfit for cultivation. In this class is included also all lands which though dry part of the year are subject to inundation at the planting, growing, or harvesting season so as to destroy the crop, and therefore are unfit for cultivation, taking the average of the seasons for a reasonable number of years as the rule of determination. You will please make out a list of all the lands thus granted to the State, designating those which have been sold or otherwise disposed of since the passage of the law, and the price paid for them when purchased. The only reliable data in your possession from which these lists can be made out are the notes of the surveys on file in your office; and if the authorities of the State are willing to adopt these as the basis of those lists you will so regard them. If not, and those authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will so report them. The following general principles will govern you in making up these lists, to wit: Where the field-notes are the basis, and the intersections of the lines of swamp and overflow with those of the public surveys alone are given, those intersections may be connected by straight lines; and all legal subdivisions the greater part of which are shown by these lines to be within the swamp or overflow will be certified to the State; the balance will remain the property
88 of the Government. Where the State authorities may conclude to have the surveys made to determine the boundaries of the swamp or overflowed lands, those boundaries alone should be surveyed, taking connections with the nearest section or township corners, or where the swamp or overflowed lands are on the borders of a stream or lake the stream or lake could be meandered and ordinates surveyed at suitable intervals from the borders of the stream or lake to the margin of the swamp or overflowed land, and by connecting the ends of those ordinates next to that margin by straight lines the boundaries of the swamp or overflowed lands can be ascertained with sufficient accuracy. In no case, however, should any such boundaries or ordinates be marked in the field, as they may produce difficulty in determining the lines and corners of the public surveys hereafter, and thus lead to litigation. The selections in all these cases will be made as before directed. Where satisfactory evidence is produced that the whole of a township or of any particular or specified part of a township or the whole of a tract of country bounded by specified surveyed or natural boundaries is of the character embraced by the grant, you will so report it. The adjacent

subdivisions, however, to be subject to the regulations above given; and in every case under each rule or principle herein prescribed, forty-acre lots or quarter quarter-sections will be regarded as the legal subdivisions contemplated by the law. The affidavits of the county surveyors and other respectable persons that they understand and have examined the lines, and that the lands bounded by lines thus examined and particularly designated in the affidavit are of the character embraced by the law, should be sufficient. The line or boundary of the overflow that renders the land unfit for regular cultivation may be adopted as that which regulates the grant. You will make out lists of these lands as early as practicable, according to the following form, one copy of which you will transmit to the land offices and another to this office. The lands selected should be reserved from sale, and after those selections are approved by the Secretary of the Interior the register should enter all the lands so selected in his tract book as granted to the State by act of September twenty-eight, 1850, being swamp or overflowed lands, and on plats enter on each tract, State act of September twenty-eighth, 1850. Copies of the approved lists will be sent to the register for this purpose. Your early attention is requested in this matter that the grant may be disposed of as speedily as possible.

Very respectfully, your obedient servant,

J. BUTTERFIELD, *Commissioner.*

Part of Section.	Section.	Township.	Range.	Remarks.

89 III. An act of the General Assembly of the State of Iowa, passed January thirteenth, 1853:

SECTION 1. Be it enacted by the General Assembly of the State of Iowa, That all the swamp and overflowed lands granted to the State of Iowa by the act of Congress entitled An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits, approved September twenty-eighth, 1850, be, and the same are hereby, granted to the counties respectively in which the same may lie or be situated, for the purpose of constructing the necessary levees and drains, to reclaim the same; and the balance of said lands, if any there be after the same are reclaimed as aforesaid, shall be applied to the building of roads and bridges, when necessary, through or across said lands, and if not needed for this purpose, to be expended in building roads and bridges within the county.

IV. An act of the General Assembly of the State of Iowa, passed January twenty-fourth, 1853, as follows:

SECTION 1. Be it enacted by the General Assembly of the State of Iowa, That as soon as the examination and survey of the swamp

and overflowed lands in any of the counties in this State shall be completed by the county surveyor or other person appointed for that purpose, a full and complete return of the same shall be forwarded to the secretary of State, whose duty it shall be to report the same to the surveyor general.

V. An act of the General Assembly of the State of Iowa, passed January twenty-fifth, 1855:

SEC. 3. That the Governor is hereby authorized to adopt such measures as to him may seem expedient to provide for the selection of the swamp lands of this State, and to secure to the State the title to the same, and also for the selection, in the name of the State, of other lands in lieu of such swamp lands as may have been or may hereafter be entered with warrants: Provided, That the provisions of this act shall not be construed to apply to any swamp lands which have already been selected by any organized county of this State under the provisions of any previous law: And provided further, That this act shall not be construed to impair the rights of the counties of this State to any swamp lands within said counties under the provisions of any law in force in relation to the same, and that the selections made by the organized counties shall be reported by the Governor to the authorities at Washington.

90 VI. A joint resolution of the General Assembly of the State of Iowa, adopted July twelfth, 1856, as follows:

Memorial and joint resolution in relation to swamp lands.

To the Senate and House of Representatives of the United States in Congress assembled:

Your memorialists, the General Assembly of the State of Iowa, respectfully represent that under the act of Congress entitled An act to enable the State of Arkansas and other States to reclaim the swamp lands within its limits, approved September twenty-eighth, 1850, a considerable amount of such land accrued to the State of Iowa; that by an act of the General Assembly of the State of Iowa, passed in January, 1852, entitled An act to dispose of the swamp and overflowed lands within the State, and to pay the expenses of selecting and surveying the same, those lands were granted to the counties respectively in which they were situated in trust for the purpose of draining and reclaiming the same, and provisions were made for the selection, survey, and disposal of the same. That under the last-named act the greater part of the organized counties of the State containing swamp lands proceeded to select and survey the same. That much of the land so selected has been returned according to the provisions of law and the instruction of the proper department to the land office of the several districts in which it was situated, marked upon the plats as swamp lands and withheld from sale or entry, and plats of land so withheld furnished to the several counties in which it was situated; that subsequently, to wit, on the twenty-fifth of January, 1855, an act of the General Assembly of this State was approved, entitled A bill to prevent trespass or waste

upon the swamp or other lands in the State of Iowa, and for other purposes, by which, among other things, pre-emption rights were granted to actual settlers upon the swamp or overflowed lands when the same had been selected, and return thereof made to the county judges of the several counties; and at the same session of the General Assembly an act was passed authorizing the Governor of the State to cause the swamp lands in the unorganized counties of the State to be selected. * * * Your memorialists would further represent that under the instructions of the Commissioner of the General Land Office, dated February eleventh, 1856, much hardship and in many instances great injustice has been and will be wrought upon actual settlers upon the swamp lands as well as upon the counties in which they are situated; under those instructions the question as to whether the lands selected were swamp or not has been permitted to be opened and application for said lands been allowed at the land offices by filing the following affidavit, viz:

91 STATE OF IOWA, }
County of ——, } *ss:*

On this — day of ——, 1856, personally appeared before me the undersigned —— ——, in the State of Iowa, —— ——, who, being by me duly sworn, deposes and says that he is well acquainted with the character of the soil in the following described tract of land, to wit: —— of section ——, in township ——, of range ——, in the district of lands subject to sale at ——, in the county of ——. That he has been over and examined the lines of said land and the marks or designations on the corner posts or trees, and from such examination has ascertained and knows the greater part of each forty-acre tract thereof to be dry and fit for cultivation, without artificial drainage or embankment, and free from such regular periodical overflow, either at the planting, growing, or harvesting season, as would materially injure or destroy a crop.

And further, that such was the character thereof on the twenty-eighth day of September, 1850, the day on which the swamp land law was passed.

Subscribed and sworn before me, on the day aforesaid.

Those instructions are based upon the supposition that the selections made by the State or county agents, even when properly authenticated and followed by a withdrawal of the lands so selected from sale or entry, are not final nor binding upon the General Government. This supposition your memorialists do not design at this time to controvert, nor do they deny that the selections may not in some instances have embraced dry and tillable lands; but they do say that the character of many of the lands selected as swamp lands has materially changed within the last two years; that this change is owing, partly to the improvement of contiguous lands, partly to the construction of roads through them, which in some instances operate as drains, but mainly to the drought of the summer of 1854; that there are numerous tracts of land in many counties, which, prior to said drought, could not be crossed by

teams, and upon which there was always standing water, which could not now be proved to be swamp lands. The particular point which your memorialists wish to make is, that after the General Government has acquiesced for a series of years in the action taken by the State of Iowa in relation to those lands, without any interference, after vested rights have been permitted to accrue, and contracts to be made for the purpose of reclaiming those lands, rights and contracts accruing, and made in good faith, based upon grants of several years' standing, it would be an act of injustice that would inevitably work much wrong and hardship, both to individ-
92 ual settlers and to counties, resulting in the loss of homes to the former, and involving the latter in debt, to permit the question of the character of these lands to be opened at this late day, and allow applications for the same to be filed at the land offices, without providing against infringement of vested rights, and securing the counties from loss under contracts made in good faith. In many of the counties bordering on the Missouri river the proportion of the swamp land is large. They embrace the bottom lands of the Missouri and its tributaries, and are so liable to inundation that it would require an extensive system of draining and dyking to reclaim them and render them fit for cultivation. In those counties we are informed a large amount of those lands have been applied for by non-resident speculators, covering in many instances the entries made by actual settlers under the provisions of the State laws. The settlers, of course, if they lose their homes, will look to the counties for indemnity, and will demand, not only a return of the purchase-money, but damages; while the counties must either lose the land applied for, and pay damages to actual settlers, or become involved in expensive litigation, in many instances at a remote land office, to prove each separate tract applied for under the instructions of the Commissioner of the General Land Office to be swamp land. The large amount of lands in some of the western counties applied for by non-residents, amounting in some instances to twenty or thirty thousand acres, precludes the possibility of the affidavits upon which they are based having been made in good faith by persons so familiar with the lands as to be able to swear to the metes and bounds of each tract. Your memorialists, therefore, are impressed with the belief that if the true character of those lands were ascertained, it would be found that but a small proportion of them are dry and fit for cultivation, and that while the General Government will suffer but a trifling loss by confirming them to the State, much wrong will be wrought upon the settlers who have entered or pre-empted them under the State laws, and upon the counties in which they are situated, if this question of their actual character is yet to be determined. Their original selections by the State and county agents were *prima facie* evidence that they are swamp or overflowed, and their reservation from sale or entry at the Government land offices, for so long a period, should be conclusive. * * * *

VII. Letters written by different Governors of Iowa to the

officers of the Land Department of the General Government as follows:

1.

EXECUTIVE OFFICE,
BURLINGTON, IOWA, *January* 30, 1855.

SIR: I am authorized and instructed by the General Assembly
93 of this State to take immediate steps to cause the swamp lands donated by act of Congress to the State to be selected, and the grant closed; to this end full powers are conferred on me. You are perhaps aware that two years ago these lands were granted by the State to the counties in which they are situated, and the counties are required to reclaim them from overflow. Some of the counties, through their surveyors, have selected the lands, reported to the surveyor general at Dubuque, and appointed drainage commissioners to superintend the work of reclamation. Other counties have done nothing under the law, and in some counties there are no inhabitants, and consequently no organization. I find in this office no instructions from the Land Office at Washington upon the subject, and there is no record of any correspondence. I learn from those who profess to be informed on the subject that no portion of these lands will be confirmed to the State until all the swamp lands in the State are selected and reported to the proper department. I desire a copy of all the instructions and rules that have been issued or established that relate to the swamp lands, and shall be under many obligations to you for any information that may facilitate the closing of this grant.

I am, very truly, etc., JAMES W. GRIMES.

Hon. JOHN WILSON,
Commissioner of General Land Office.

2.

BURLINGTON, *January 30th*, 1855.

DEAR SIR: I am authorized to close the grant of swamp lands to the State as speedily as possible. To this end I wish to be furnished with the following information:

1. A list of all counties that have reported swamp lands to your office, and the aggregate amount of such lands in each county so reported.

2. The counties whose lists have been approved and such as have been rejected.

94 3. A list of the counties, if you have any such, that are now selecting these lands.

4. The forms that are necessary to follow in making the returns and selections.

5. A copy of all instructions from the General Land Office on the subject of swamp lands.

I am, very truly, etc., JAMES W. GRIMES.

W. LEWIS,
Surveyor General, Dubuque, Iowa.

3.

CIRCULAR.

EXECUTIVE OFFICE, IOWA, BURLINGTON, *March 1st*, 1855.

COUNTY JUDGE OF —— COUNTY.

SIR: I have to request that you will take immediate steps to cause the "swamp and overflowed lands" in your county to be selected, and correct lists thereof reported, with the oath of the selecting agent, to the surveyor general for his approval. If from any cause you are unable to have this duty performed immediately, I desire you to so inform me that I may cause it to be done by agents of the State. It is proper for me to say, however, that whether done by the State or county agents, the expense of making the selections must be ultimately paid by the county.

Your obedient servant, JAMES W. GRIMES.

4.

EXECUTIVE OFFICE, IOWA, BURLINGTON, *March 2d*, 1855.

SIR: I am duly in receipt of your favor of the fourteenth ultimo covering the instructions of the General Land Office in relation to selecting "swamp and overflowed lands," and also some of the correspondence of your office on the same subject. For your compliance with my requests in this regard, I return you my thanks. The "swamp and overflowed lands" in thirty-nine of the counties of this State have now been selected and returns made to the surveyor general at Dubuque. I infer from this letter to me that these selections have been approved. There remain about sixty counties in the State from which no returns have been made, and no steps taken to secure returns to be made until within the last two weeks. Returns have been made to the surveyor general from all the counties in the Fairfield land district except from the counties of Davis and Wapello. I have directed the surveyors of those counties to proceed forthwith to make the selections and returns. I think this duty can be performed in four weeks. When those returns are made I hope you will have no hesitation to immediately confirm the grant to the State to the swamp lands in the Fairfield land district and issue patents therefor. The selections have also been made and returned from all of the counties in the Iowa City land district except in the county of Poweshiek, and a part of each of the counties of Lucas and Benton. I have directed the selections to be returned for these counties, and judge that the labor can be performed in six weeks. I have employed agents to complete the selections in the Dubuque and Chariton land districts, but I fear that the greater part of the summer will elapse before the work can be done. With your permission, I propose in some of the counties to adopt the returns of swamp lands as made to the surveyor general by his deputies. I presume that the fact that Governor Hempstead chose to employ the county agents to select these lands, will not preclude me from adopting whichever of the two methods I may see fit. You may be assured that I am as anxious

95

to close this grant as any one can be. Every day's delay is a great injury to the State.

Your obedient servant, JAMES W. GRIMES.

To the Commissioner General Land Office, *Washington, D. C.*

96 5.

Burlington, Iowa, *January* 17, 1856.

Hon. Thos. Hendricks,
Commissioner of Land Office, Washington, D. C.

Sir: I am pleased to learn as I do by yours of the thirty-first December last, just received, that there is at length a prospect of there being some end to the conflicts that were likely to arise between the claimants to swamp lands under the United States and under the State. I have been fearful that the question whether or not a tract of land was really swamp and overflowed would not be settled in a single lifetime. I thank you for having adopted a method which must be satisfactory to all parties. The selections in this State have for the most part been made by the agents of the respective counties. There are doubtless many tracts selected that cannot properly be classed as swamp and overflowed lands, and, on the other hand, I understand that many tracts that are properly swamp lands have not been selected. These lands were selected in some of the counties three and four years ago; since the selection they have become valuable. I know of tracts that are now worth from $10.00 to $40.00 per acre. These are the lands that efforts will be made to strike from the selections. I have thought it proper to call your attention to this subject that you might, if you deemed it compatible with the law, with the regulations of your office, and with justice, require all such lands to be offered at public sale; by such a course all citizens would have an equal chance at the lands that have been so long reserved from sale.

Your obedient servant, JAMES W. GRIMES.

6.

97 A circular, of which the following is a copy, this day issued to the judges of the counties in which no selections and returns of the swamp and overflowed lands have been made:

Circular.

Executive Chamber, Iowa,
Des Moines, *February* 2*d*, 1858.

To the County Judge of —— County.

Sir: Permit me to call your attention to the importance of having the swamp and overflowed lands in your county selected and returned according to law with all possible dispatch. These lands in September, 1850, were granted by Congress to the State, and in January, 1853, by the State to the counties in which they are sit-

uated, they paying the expense attending their selection, etc., etc. Most of the counties in the State have attended to this matter, and their swamp lands have been recognized by the proper department at Washington city. But the Secretary of the Interior has not yet patented or confirmed to the State a title to a single acre of this land; for the reason, it is understood, that all the swamp and overflowed lands have not yet been selected. Your county is among the delinquents. As you are deeply interested in this subject, will you not at once employ your county surveyor or some other competent person to select and return a list of all the swamp and overflowed lands in your county unentered on the twenty-eighth day of September, 1850, to your office, a copy of which you will retain, and send the original to Elijah Sells, secretary of State, at Des Moines, thence to be forwarded to the proper department for recognition. The fact that some or all of said swamp lands have been entered at the Land Office of the United States, and are now owned by individuals, ought not to dissuade you from attending to this duty, for in that event the General Government should refund through the State to the county either the money for which they were sold or issue scrip for a like amount of other lands. If you decline accepting these lands on the terms proposed in the law, please give me the earliest notice of the same, that I may take the proper action therein.

If you want them, let them be selected within the next sixty
98 days if practicable, and that too in the method specified in the act of Congress hereto annexed for your guidance. I also refer you below to the dates of the different acts of the General Assembly of our State on this subject, to which you can refer, as you will have them with you. These swamp lands have been the source of much trouble in many of the counties, and I am anxious to have the whole matter adjusted with the General Government as soon as possible.

RALPH P. LOWE, *Governor.*

To the above circular was appended a copy of "the swamp land act of September twenty-eighth, 1850; also the following memoranda: 1, fifth February, 1851; 2, thirteenth and twenty-fourth January, 1853; 3, twenty-fifth January, 1855; 4, twelfth July, 1857.

7.

The following letter was this day addressed to Hon. Thomas A. Hendricks, Commissioner of the General Land Office, Washington, D. C.:

EXECUTIVE CHAMBER, IOWA,
DES MOINES, *March 22d*, 1858.

Hon. THOMAS A. HENDRICKS:

The act of our General Assembly, approved January twenty-eighth, 1858, authorizing the appointment of an agent to proceed to Washington to effect an adjustment of our swamp land interests, you construe to this effect, to wit: "That the agent is authorized to receive from your Department a list of the swamp and overflowed lands inuring to the State under the act of Congress approved Sep-

tember twenty-eighth, 1850, also lists showing the lands disposed of since the grant, and for which the State will be entitled to indemnity upon presenting satisfactory proof of the character of the land," and you ask me to signify at an early day whether I concur in this view of the subject. I regret to say I do not, if by presenting satisfactory proof of the swampy
99 character of the lands you mean we must go behind the returns and reports of the selecting agents and offer, independent of such returns, extrinsic evidence that they were swamp lands within the true intent of the act of September, 1850. It is true, the act of March second, 1855, would seem to contemplate and require such proof, but the hardship and injustice of such a requirement was very fully and clearly set forth in the memorials sent by our General Assembly in July, 1856, and January, 1857, to Congress, one of which is herewith enclosed, to which your attention is respectfully called. As a Western man, you will readily comprehend and appreciate the difficulties attending such a course, and it seems Congress did also, for, in pursuance of these memorials, on the seventh of March, 1857, another act was passed confirming the selections of the swamp lands and declaring they should be approved and patented to the State, thereby relieving you, as I understand it, from all responsibility of hearing proof and passing upon the question whether they are or are not swamp lands within the purview of the law of 1850. Our State has been at great expense in selecting these lands. We intended to be honest and fair about it. Errors may have been committed—undoubtedly many were—and exceedingly embarrassing questions would arise in determining the character of some of them if an investigation were gone into. But Congress, in the dispensation of benefits to the new States, does not desire to be very particular and have this grant adjudged down to a tract, and hence the object of this last act, which was to put an end to this controversy by fully approving the selections of these lands and ordering them to be patented. I sincerely hope you will concur in this view of the subject, and that the selections may be patented to the State, excepting those which have since been sold for cash or taken up with land warrants or scrip; and that a list of such may be made out; that the State may have an equivalent in money for one class and other lands for the other class, as the law contemplates. I will be glad to hear from you at Keokuk, Iowa.

Yours, very truly, RALPH P. LOWE.

100 8.

EXECUTIVE CHAMBER, IOWA,
KEOKUK, *October* 26, 1858.

Hon. THOMAS A. HENDRICKS, *Commissioner:*

Upon my late visit to Des Moines, the capital of the State, I obtained from the register of the land office there the enclosed statement, which surprised me much, for it was impossible for me to reconcile it with the act of 1856. Will you do me the favor to explain how it is that the selections of the swamp lands in that land district have been so reduced? My personal knowledge of the coun-

ties of Muscatine and Louisa, having lived ten years in the former, inclines me to believe there must be some mistake of great magnitude in the list certified. These two counties embrace the mouths of the Iowa and Red Cedar rivers and the Muscatine island, containing some twenty-three or twenty-four thousand acres of land, a very great part of which is subject to periodical overflow, on which the drainage commissioner is constructing a levee of many miles in order to reclaim them. I certainly cannot be mistaken in supposing these two counties alone to have more overflowed and swamp lands than you have given to the whole land district. I hope you will favor me with an explanation of this matter. There is one other matter in connection with this subject to which I desire to call your attention. Very shortly after Congress had granted to the State the swamp lands the Legislature of the State gave them to the several counties in which they are located. Some of these counties have commenced a system of drainage, and are building court-houses and other county buildings, expecting to have the avails of these lands to pay for these improvements. Many of the county judges have sold, perhaps prematurely, no small quantity of the lands, presuming that the title would ultimately be confirmed to them. I recently heard a rumor that either you or the Secretary of the Interior had held that whatever swamp lands fall within the grant of lands made to our
101 railroads shall go to them instead of the State or counties; if such is the case, I have no vocabulary that will sufficiently express the confusion, embarrassment, and dissatisfaction that will follow such a decision; and if the lists of swamp lands now being made out are made out with reference to such a decision, I ask that you suspend the matter until I can be fully heard before you in the premises, and until I also shall have an opportunity to confer with our railroad companies who are setting up this claim, for I cannot help thinking that when they come to fully comprehend the interminable difficulties that stand in the way of their claim, and the opposition they will necessarily encounter all over the State, they will feel it alike their duty and their interest to abandon any claim to these lands. But in the meantime I would like to be made acquainted with the rule or ground upon which such a decision, if one has been made, was founded. If it is based upon the idea that the grant of lands to the railroads is of such a nature as to vest the legal title at once, while the act granting the swamp lands does not, still would they not be in the condition of the man obtaining by purchase or otherwise the legal title, with full notice of an outstanding equity? I think so. Will you pardon me for seeking this information, as I conceive it my duty for the time being to protect the interests of all parties in the State.

Most respectfully, RALPH P. LOWE.

9.

EXECUTIVE CHAMBER, IOWA,
DES MOINES, *April 3d*, 1859.

THOS. A. HENDRICKS, *Commissioner, etc.:*

You did me the favor to make some modification in the forms of

taking the proof in regard to the swampy character of certain sections of swamp and overflowed lands which had been entered by purchasers and locators, and which Mr. Skinner was to em-
102 body in a new set of forms and forward to me at an early day. They have not yet come to hand, although now much needed by many of the counties. May I ask it as a special favor that Mr. Skinner will prepare and have them forwarded to my address at Keokuk, Iowa, as soon as practicable? I would also express the hope that the remaining lists of our swamp lands may be made out and forwarded at as early a day as will suit your convenience. The counties to whom the lands have been assigned by the State are exceedingly impatient, and annoy me much by their daily inquiries through the mail. I had the honor while at Washington of addressing the Secretary of the Interior on the right which the land-grant railroad companies of this State claimed to contest the character of the swamp land sections within the range of their grant for railroad purposes. Some time since I received a letter from the Secretary of the Interior, enclosing a copy also of a letter which he had addressed to you as a reply to my communication to him, acceding in the main to the suggestion which I had the honor to make to him in relation to that subject, provided it should comport with your view of the matter. I desire to enquire whether the suggestion of Mr. Thomas in the premises will be adopted and carried out by your Department. It would close up this troublesome matter much sooner, and put an end to the controversy between the State and the railroads, which I regret, for the interest of all parties, it is deemed necessary to raise. I still think the act of Congress, dated March second, 1857, confirming the selections, extends, as a necessary and legal consequence, back by relation to the date of the selections, and therefore by no possibility could the roads have a legal right to contest the correctness of the selections. However, I do not now wish to rediscuss this question, but would simply say, in connection with this subject, that about the time I left Washington this same question had been raised in the State of Louisiana, and I understood from Mr. Skinner that it was possible that either you or the Secretary of the Interior would refer it to the determination of the Attorney-General, which I hope may be the case, for I feel quite assured that he would hold the same
103 opinion which I have indicated. This would save you as well as myself inconvenience and trouble, the parties much expense, and the railroad interests would really be better subserved, for in most cases the counties would give or subscribe as stock all of their swamp lands to procure for themselves railroads, but they want to dispose of their lands in their own way and make their own arrangements with the railroad companies. As it is evidently a question of doubt, I submit whether a reference to the Attorney General would not be proper as giving in all probability better satisfaction to the different States interested. You will oblige me by sending to Keokuk all letters addressed to me. All lists of lands I would have sent to this place.

I remain, respectfully, your humble servant,

RALPH P. LOWE.

STATE OF IOWA, }
Executive Department, } ss:

I hereby certify that the foregoing are correctly transcribed from the records of the executive office of the State of Iowa, the same appearing therein as copies of original letters written and transmitted at the times and by and to the parties therein indicated.

In testimony whereof, witness my hand and the great seal of the State of Iowa, this sixteenth day of April, A. D. 1879.

JOHN H. GEAR.

By the Governor:
J. A. T. HULL, *Secretary of State.*

VIII. Letters by the land officers of the United States as follows:

1.

SURVEYOR GENERAL'S OFFICE,
DUBUQUE, *Nov. 8th*, 1853.

SIR: Since your letter of the ninth of September came to hand, I have received instructions from the Commissioner of the
104 General Land Office requiring me to close up the "swamp land" business in this surveying district with as little delay as practicable. Immediately on the reception of said instructions I addressed, as the proper officer, the Governor of this State, requesting him to inform me officially what action had been taken in the premises, and suggesting the propriety of a mutual understanding in order that the business might be transacted to the satifaction of all concerned. As he has failed to reply to my enquiries, both by letter and in person, and as further delay is out of the question, I must turn to you as the second officer of the State and earnestly request your active co-operation in bringing the matter to a speedy conclusion. The act of twenty-eighth of September, 1850, grants to the several States "those lands from which being swampy or subject to overflow are unfit for cultivation. In this class is included all lands which, though dry a part of the year, are subject to inundation at the planting, growing, or harvesting season, so as to destroy the crop, and are therefore unfit for cultivation, taking the average of the seasons for a reasonable number of years as the rule of determition." In his instruction to this office, the Commissioner says: "The only reliable data in your possession from which these lists, swamp lands, can be made out are the field notes of survey on file in your office, and if the authorities of the State are willing to adopt these as a basis of those lists, you will so regard them. If not, and these authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will so report them." As the authorities of this State do not seem willing to adopt the lists selected from the plats and field notes by this office, and have, as I am informed, appointed agents to select all lands of the character mentioned in the aforesaid act, it becomes my duty as the officer by whom their selections are to be approved to desig-

nate the manner in which their lists shall be made out authenticated and returned to this office, in order that they may conform to the instructions I have received. In the first place it must be distinctly understood that "forty-acre lots or quarter-quarter sec-
105 tions are alone regarded as the legal subdivisions contemplated by law," therefore all selections must be made and returned with reference to this view of the law: When the whole of a section or township is a swamp, that is entire, or subject to overflow, it will be sufficient so to describe and prove it, but in determining the character of the adjacent lands it is not sufficient to ascertain that the greater portion of a section, half section, or quarter section is swamp or subject to overflow, for this might be the case, and yet there might remain one or more forty-acre lots of dry land which would not come within the provisions of the grant. The absolute importance, therefore, of regarding the smallest legal (U. S.) subdivision as the basis of all selections will be apparent, and when the greater portion of any forty-acre tract is swamp or overflowed land, it will of course become the property of the State. The whole may be summed up in these words: Satisfactory proof must be given that each quarter-quarter section reported is either swamp or overflowed land. This may be done in the body of the lists or in the affidavits by which they are authenticated, and if hereafter it is found that any lands selected and reported are not of the character contemplated by the grant, those making such false reports subject themselves to be prosecuted for fraud and incur the penalties of the act of third of March, 1823. All lists returned to this office must be originals; none other will be received. Accompanying this I send you forms for lists and affidavits attached. Those that have been already returned by you will receive examination forthwith. My instructions require me to forward the lists to Washington by land districts only. You will, therefore, see the importance of prompt action on the part of all the authorities in order that none may be delayed by want of action on the part of others. I presume that the whole matter can be closed by the first of April next, that is in all organized counties, and I would suggest that you inform the authori-
ties of all such that, unless returns are made within the time
106 specified, they will be debarred from the benefits of the grant.
On this subject I will, however, confer with the Commissioner without delay.

Very respectfully, WARNER LEWIS,
Surveyor General.

GEO. W. McCLEARY,
Secretary of State of Iowa, Iowa City.

Forms Attached.

List of swamp and overflowed lands lying in the county of ———, in the State of Iowa, selected and returned by C. D., county surveyor of said county (or State agent) under authority of ———, and according to an act of the general assembly of the State of Iowa, approved January thirteenth, 1853.

Parts of Sections.	Section.	Towns.	Range.	Acres.	Remarks.
Nw ¼ of sw ¼ -----	2	80	2	40.00	Swamp, heavily timbered.
Lot No. 2 ----------	3	80	2	30.05	Overflows to the depth of two feet.
Lot No. 3 ----------	3	80	2	47.65	" " "
Lot No. 6 ----------	3	80	2	29.80	" " "
Se ¼ of nw ¼------	9	81	4	40.00	Deep swamp.
Nw ¼ of nw ¼-----	9	81	4	40 00	" "
Se ¼ of nw ¼------	9	81	2	40.00	Swamp.

I, A. B., county surveyor of ——— county, (or locating agent) do solemnly swear that I understand and have examined the lines bounding the tracts of land particularly designated in the lists hereunto affixed; and I do further solemnly swear that all lands designated in said lists are "swamp and overflowed lands," and of the character embraced by the law of Congress approved September twenty-eighth, 1850.

A. B.,
County Surveyor of ——— County.

Sworn to and subscribed by said A. B. before me, at my office in the city of ———, and county of ———, this — day of ———.

107 2.

GENERAL LAND OFFICE. *July 15th*, 1854.

WARNER LEWIS, Esq.,

Surveyor General, Dubuque, Iowa.

SIR: In answer to your letter of the twenty-seventh ultimo, having reference to the lists of swamp and overfloed lands in Iowa and Wisconsin rejected by you, I have to state that, under the instructions of this office, the selections made by agents on behalf of the State, who act under competent authority, can only be rejected on the grounds stated in my letter of the twelfth ultimo. The lists heretofore rejected by you, and to which reference is herein made, are herewith returned; you will please re-examine the same with your records, and such other evidences as accompanied the same to your office, and should it be shown to your satisfactiou, by such evidences, that the lands, or any portion of the same, are of the character contemplated by the act, you will so report them. If not, you will require from the State authorities the production of such fur-

ther evidence as will enable you to give to the lists the certificate required by this office. The nature of the evidence required, in cases where the field notes are not indicative of a swampy character, has been fully explained to you in the correspondence already had on the subject. If at any time hereafter reliable evidence should be presented to this office that such, or any, selections were erroneous or fraudulent, and that the affidavits accompanying the same were untrue, the investigation suggested by you would be authorized, or such other steps taken as the nature of the case might demand, but in the absence of any controversy the affidavit of the State agent must be regarded as establishing the title of the State to lands selected by him, provided he be credible. The United States will not even by an approval be divested of the title unless the land be of the character contemplated by the act of twenty-eighth September, 1850, and all persons guilty of fraud in making the
108 selections will upon detection be prosecuted under the act of the third of March, 1823.

Very respectfully your obedient servant,

JOHN WILSON, *Commissioner.*

3.

SURVEYOR GENERAL'S OFFICE,
DUBUQUE, *July 7th*, 1855.

JOS. S. WILSON, Esq.,
Acting Commissioner of General Land Office, Washington.

SIR: I have the honor to acknowledge the receipt of your letter of the twentieth ult., and would state in reply that on comparing the lists of selections returned by the State agents with the maps and field notes on file in this office, I made a separate list or lists, marked "rejected," of such tracts selected by said agents as were not represented as swamp or overflowed lands by said plats and field notes. On further information from the Department, I found I had no authority to reject such lands without positive evidence that they were not of the character represented, and having no such evidence, I certified the lists and forwarded them to your office. It was the intention, however, to erase the word "rejected," which by accident must have been overlooked.

Very respectfully,

WARNER LEWIS,
Surveyor General.

4.

GENERAL LAND OFFICE, *January 7th*, 1856.

WARNER LEWIS, Esq.,
Surveyor General, Dubuque, Iowa.

SIR: For your information, I enclose herewith a copy of a public notice relative to "swamp and overflowed lands;" also a
109 copy of the form of affidavit therein referred to, being such as will be required from all parties who may hereafter desire to become contestants of the State's claim to lands selected under the swamp-land law.

Very respectfully,

THOS. A. HENDRICKS,
Commissioner.

"*Swamp and Overflowed Lands.*"

Public Notice.

Pursuant to the instructions of the Secretary of the Interior, public notice is hereby given that, in order to bring to a close the business under the act of Congress approved September twenty-eighth, 1850, entitled "An act to enable the State of Arkansas, and other States, to reclaim the swamp lands within their limits," and at the same time to afford to parties who claim that portions of the lands selected under said law are dry and fit for cultivation an opportunity to introduce evidence, all lands so selected, to the approval whereof no objection be made within six months from the date hereof, will be certified and patented to the States. Such objections as are contemplated by the above must be made under oath, and filed with the register and receiver of the proper land office for transmission to the General Land Office. The necessary forms for affidavits are in the hands of said officers. The following classes of land are exempt from objection, to wit:

1. Lands entered with cash, or located with military bounty land warrants or scrip after the passage of the act of twenty-eighth September, 1850, and prior to the passage of the act of second March, 1855, "for the relief of purchasers and locators of swamp and overflowed lands."

2. Lands already patented to the State under the swamp law. In all cases where objection is raised, testimony must be taken before the register and receiver of the land office at such time, after the expiration of said six months, as they may appoint, with the consent of the Commissioner of the General Land Office.

The lists of swamp and overflowed lands are open to inspection during the regular business hours of the Land Office.

Given under my hand, at the city of Washington, this twenty-first day of December, 1855.

THOS. A. HENDRICKS,
Commissioner of the General Land Office.

5.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *June 14th*, 1866.

SURVEYOR GENERAL, *Dubuque, Iowa.*

SIR: In view of the proposed closing of your office, you are hereby instructed to forward to this office all lists and plats of swamp-land selections in your district, together with any testimony or other papers pertaining thereto.

Very respectfully,

J. M. EDMUNDS, *Commissioner.*

IX. A certified copy of plaintiff's list of swamp-land selections, and accompanying proofs; so much of which as relates to the lands described in the petition is hereinafter printed as Schedule A of this abstract.

The defendant objected to this evidence, upon the following grounds:

1. Because it is not shown that the parties who appear to have made the selections were appointed by the county court of Buena Vista county.

2. Because it is affirmatively shown they were not appointed by the county court of said county.

3. Because there are no plats accompanying the same, nor does it appear that any were made.

4. That it is incompetent, there being no evidence of the appointment of the persons claiming to have examined the lands, although they did so examine them.

111 5. That the affidavit of Judge J. W. Tucker is not competent for any purpose whatever, and the same is not verified.

6. It is not shown that said selections were ever filed in the proper offices.

7. It is not shown that the selections were ever approved by any officer of the State of Iowa or of the United States authorized so to do.

8. That the said selections are incompetent evidence for any purpose whatever.

As the trial proceeded the court did not rule upon any of the objections to evidence offered by either party, but, at the close of the evidence, overruled all the objections, and each party then duly excepted.

X. JOSIAH A. HARVEY was then sworn as a witness upon the part of the plaintiff, and testified as follows:

I am a lawyer by profession, and reside in the city of Des Moines. In 1866 I was appointed, by act of the General Assembly, a commissioner upon the part of the State of Iowa to settle with the General Government, among others, the claims of the State under the swamp land grant. I selected the list of Buena Vista county as the first case to present, in order to settle the question on which selections in so many counties hung suspended; perhaps twenty or thirty counties. Mr. Steiger opposed every effort made in the interest of the swamp land grants when it conflicted with the claims under the railroad grants. That was what he was employed to do, as I learned from him. I did not succeed in getting the list taken up and acted upon at the time I was there. After the decisions reported in 9th Wallace, 89 to 95, I began to press the matter. The next winter I renewed the application and followed it up, but not successfully. I think I was in Washington every winter from 1866 to 1873, during every session of Congress, looking after these things. I was there in 1866–7, and every session of Congress that I could do anything.

112 Exhibit B, attached to the reply in this case (exhibit here referred to was Harvey's report to the Governor of Iowa), is what I made at the time as a brief statement of what I did. I think it is correct. At one time I think a bill passed the Senate and not the House, and at another time one passed the House and failed in the Senate; but this bill, exhibit K, attached to my report,

was drawn and introduced in both Houses about the same time, at the commencement of that session. I drew it just as it passed, with the exception of the last clause, which was put in there while it was in the hands of the Committee on Public Lands. My understanding at the time was at the suggestion of the Commissioner of the General Land Office or the Secretary of the Interior. Words may have been inserted by him. I don't know about that, but he was consulted by the committee, and the last clause added, "without prejudicing the legal, etc., under the homestead laws at the date of this act."

State whether the Buena Vista county list was one of those designed to be provided for by this act.

Mr. KIDLER: We object to that as incompetent.

It was designed to cover that and all the other counties that had land suspended.

Mr. KIDDER: We will not cross-examine Mr. Harvey, but will move that his evidence all be stricken out as incompetent and immaterial.

XI. The report of Josiah A. Harvey to the Governor of Iowa, with the documents accompanying the same, hereinbefore printed, beginning with Exhibit B, page forty-eight, and extending to page sixty-six. The defendant objected to this evidence as incompetent.

XII. A letter by the Commissioner of the General Land Office as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, *July* 13, 1860.

WARNER LEWIS, Esq., *Surveyor General, Dubuque, Iowa.*

SIR: I am in receipt of your letter of the fifth instant. The first point in my communication of the twenty third ultimo is
113 held to be a correct interpretation of the meaning of the grant of twenty-eighth September, 1850, and unless the lands claimed by the State come particularly within the scope of that explanation they cannot be regarded as swamp lands. I will say again that the lands covered by the law are those only which are rendered "swamp and overflowed," and thereby "unfit for cultivation" by the inundation of great natural arteries, such as the Mississippi, and which require "levees and drains" to make them fit for cultivation. Lands beyond the reach of such overflows which are wet at certain seasons and dry at others, or those which are covered by water permanently, as shallow lakes or ponds, are not conveyed by the act.

Very respectfully, JOS. S. WILSON,
Commissioner.

XIII. A letter by the Secretary of the Interior, as follows:

DEPARTMENT OF THE INTERIOR, *September 15th*, 1860.

SIR: A copy of your instructions to the surveyor general of Illinois and Missouri, dated July sixth, 1860, was received here with

your letter of the thirteenth of that month, read, and filed, but not formally approved nor very carefully considered. The advent of this case and your reference for the principles of its settlement to these instructions render it now necessary for me to review them and state my views so far as they vary from those therein expressed by you. The principal point, and that towards which Senator Green's oral objections were addressed with most force, is this: Your instructions seem to have been framed upon that construction of the act of September twenty-eighth, 1850, which regards gards that law as granting only such lands as were both swamp and overflowed, and by the overflow rendered unfit for cultivation. It would appear to be a consequence that such lands could only be found in the vicinity of large streams liable to long-continued overflow at seasons of the year, rendering the overflowed land
114 unfit for cultivation. This view I do not regard as just and equitable. Whilst that may have been the original and restricted aim of many friends of that law who regarded it after its passage as so restricted in its effect, there were others who have always regarded that statute as granting all lands of which the greater part of any forty-acre subdivision in its natural state was "wet and unfit for cultivation," either by reason of swamps or of the overflow of streams, and to redeem which to cultivation the construction of drains or levees would be necessary. Either one of these causes singly, or both of them conspiring together, to render lands wet and unfit for cultivation, in my opinion, brings the lands within the terms of the grant; and hence there may have been prairie swamp lands granted by the law as well as low overflowed bottom lands. Such was the construction placed upon the law immediately after its passage, and under that construction it has been, I believe, thus far administered; and for this reason, if I regarded your views on this point as correct, I should not be willing to change the construction in that respect after such a lapse of time. A second point I desire also to make clear in this connection. In these instructions of July sixth, 1860, you say: "Those tracts which have been disposed of by the General Government prior to the date of selection cannot be claimed as swamp, because their arable character, corroborated by actual purchase as such, and their transfer to individual ownership, constitute record evidence not open after such lapse of time to parol impeachment." In my letter of eighth February, 1860, it is stated in reference to that class of cases wherein subsequent to the third March, 1857, parties have made private entries of lands, and after the entries the lands have been selected or claimed for the State under the swamp grant, that "the entries, if otherwise unobjectionable, are entitled to confirmation and patent, unless the field-notes of survey indicate that the land was swamp and overflowed. In that case the claimants under the entries appear to be entitled to produce evidence that the land was dry, but failing in such proof, their entries should be cancelled." I would here add that where the entries of lands
115 that have been selected as swamp are placed upon your files for patenting under the order of eighth February, 1860, the

swamp selections should be specifically and finally rejected, and not held in a state of suspense, or referred back to the surveyor generals. It will thus be perceived that the paragraph above quoted from your instructions of sixth July, 1860, is in accordance with my views, when it is applied only to the cases to which those instructions referred, viz., where the lands had been sold before selection, and the field-notes show that they were not swamp or overflowed; but I do not concur in the proposed application of the same principle to those cases where the field-notes do show that the lands were of the description granted by the act of Congress of twenty-eighth September, 1850. So far as the lands involved in the lists returned are vacant, or were vacant at the date of their report by the State agents to the surveyor general, that officer should examine and make his decision upon the proof adduced by the State, and if that is satisfactory as to the swampy or overflowed condition of any such tracts of land at the date of the grant, they should be reported by him in the lists as enuring to the State; and it seems scarcely necessary to add that upon receiving returns of State agents, who have made selections of vacant lands, the surveyor general should immediately notify the local land officers of the selections, and the lands should be withheld from private entry until after the selections are finally disposed of, by rejection or approval, to the State. The matter should be disposed of fully and finally as soon as practicable, and reinvestigations and suspensions avoided, if possible.

Very respectfully,

J. THOMPSON, *Secretary.*

The Commissioner of the General Land Office.

XIV. An act of Congress approved April fifth, 1872, hereinbefore printed as "Exhibit K," pages sixty-five and six.

116 XV. A letter by the Commissioner of the General Land Office, as follows:

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE, WASHINGTON, *June* 21, 1872.

J. B. CALHOUN, Esq.,
Land Commissioner of the Iowa R. R. Land Co., Cedar Rapids, Iowa.

SIR: You are hereby notified that all selections of lands by the State of Iowa, under act of September twenty-eighth, 1850, known as the "swamp grant," are about to be taken up and examined with a view to certifying the same to the said State under the provisions of said act, and that unless proper proceedings are instituted by you within ninety days from the date hereof to contest the claim of the State under the act above mentioned to such of said selections as are claimed by the Cedar Rapids & Missouri River, Dubuque & Sioux City, and Iowa Falls & Sioux City Railroad Companies under railroad grants, this office will proceed with such examination and certification as though no conflicting interest existed. Lists of swamp selections filed in this office by the State of Iowa, which the Commissioner is, by act of March fifth, 1872, entitled "An act for the

relief of Lucas, O'Brien, Dickinson, and other counties in the State of Iowa," authorized and required to receive and examine, have been placed on our records, and the register and receiver of the districts in which such lands lie have been furnished with lists of the same by this office; and in the following counties, to wit, Benton, Ida, Crawford, Carroll, Monona, Dubuque, Franklin, Grundy, Blackhawk, Buena Vista, and Calhoun, a portion of such selections are claimed by the above-named railroad companies. On application to the land officers of the proper districts information will be given respecting the manner of proceeding to contest the claim of the State to such selections.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

117 XVI. A letter of the Commissioner of the General Land Office to Galusha Parsons, as follows:

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April* 14, 1875.

Hon. GALUSHA PARSONS, *Des Moines, Iowa.*

SIR: I have received yours of the sixth inst. addressed to this office; also one of the eleventh inst. to Secretary of the Interior, in reference to swamp lands in Buena Vista county, Iowa.

In reply thereto I have to say that the lands claimed as swamp lands in Buena Vista county are of a class which by the act of Congress approved March fifth, 1872, the Commissioner of the General Land Office is authorized and required to receive and examine the selections and allow or disallow, etc. Prior to the passage of that act my predecessors had refused to recognize these selections, because they had not been reported to this office by the United States surveyor general with his certificate of their swampy character; on appeals from such rulings they were twice affirmed by the Secretary of the Interior. A large part of the lands had been certified to the Dubuque and Pacific railroad; such certification, however, is not an entry within the meaning of the act of March fifth, 1872, and is not protected by that act; and if the land was actually swamp land at the date of the grant, September twenty-eight, 1850, the railroad could not acquire any title to it under the grant of 1856, and in all cases where the question of the swampy character of the land has not been already decided by this office, the matter will be examined on the request of the State authorities. The railroad company will be notified that the claim of the State is about to be taken up and examined, and that unless the proper proceedings are instituted by them within ninety days to contest the said claim this office will proceed with the examination on the evidence already in the office. If after such notice the railroad company desire an investigation, it will be ordered, and the State will be notified thereof, and will be permitted to offer additional evidence in support of its claim. Should the State authorities desire to
118 take the initiative, on application to that effect the register and receiver will be directed to hold an investigation after

notice to all the parties concerned, at which evidence will be taken on both sides (if offered), and reported to this office. As the swamp grant was made to the State, the General Land Office recognizes no other authority than the State in the management of the business, so that all proceedings must be in the name and be prosecuted by authority of the State.

Very respectfully, S. S. BURDETT,
Commissioner.

XVII. A letter by the Commissioner of the General Land Office to J. Van Deventer, hereinbefore printed as "Exhibit A," pages eighty-three and four.

XVIII. A letter by the Commissioner of the General Land Office to Galusha Parsons, as follows:

GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct.* 18, 1875.

GALUSHA PARSONS, Esq., *Des Moines, Iowa.*

SIR: I am in receipt of your letter of the eighth inst. in regard to investigation of the swampy character of certain lands claimed by the State of Iowa, which had been certified for railroad companies. In reply I have to inform you that the Hon. J. F. Wilson, attorney in behalf of the Cedar Rapids & Missouri River, Dubuque & Sioux City, and Iowa Falls & Sioux City Railroad Companies, on the thirtieth of July last, filed an appeal from the decision rendered by this office on the seventh of July last, and the papers pertaining to said case were on the fifth inst. submitted to the Hon. Acting Secretary of the Interior for his action and decision thereon, and as soon as the case is determined you will be informed.

Very respectfully, S. S. BURDETT,
Commissioner.

119 XIX. A letter by the Commissioner of the General Land Office, as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, *Feb.* 1, 1876.

GALUSHA PARSONS, Esq., *Des Moines, Iowa.*

SIR: I am in receipt of your letter of the twenty-sixth ult., asking what action has been taken relative to the conflicting interests of certain railroads with the State's claim under the swamp grant to certain lands in Buena Vista county, Iowa. In reply, I have to inform you that the matter referred to is now before the Secretary of the Interior, on appeal from our action as contained in letter to W. F. Steiger, dated July seventh, 1875. The case was submitted to the Secretary on the fifth of October, 1875, and as soon as a decision is rendered thereon you will be duly notified of the result.

Very respectfully, etc., L. P. LIPPINCOTT,
Acting Commissioner.

XX. The application by the register of the State land office and

Governor of Iowa, to the Commissioner of the General Land Office, hereinbefore printed as "Exhibit No. 1," page sixty-six.

XXI. The decision of the Commissioner of the General Land Office upon the above application, hereinbefore printed as "Exhibit C," beginning upon page sixty-seven and extending to page seventy-two.

XXII. The defendant's notice of appeal from the foregoing decision, hereinbefore printed as "Exhibit D," pages seventy-two and three.

XXIII. A regulation of the Department of the Interior, as follows:

Regulations in reference to Appeals.

GENERAL LAND OFFICE, *January* 24, 1859.

The following regulations are established by authority of the Secretary of the Interior, communicated to this office in his letter
120 of twenty-first instant, in relation to appeals to his Department proper, and will be observed and enforced from and after this date. In every case when an appeal may hereafter be taken from the decision of this office, the party appealing, or his attorney, will be required to notify the office in writing of the points of exception to its action. An opportunity will also be afforded to other parties interested in the case to be heard, if desired, and a reasonable time will be allowed. All parties to such appeals will be required to file in this office all arguments and documents of whatever character before the cases are submitted to the Department, in order that they may be referred to and considered in our report to the Secretary, if deemed expedient. In submitting cases on appeal, particular care will be taken to state the question or questions at issue, and the grounds of appeal, and the action of the Department will be confined to those questions alone, unless sufficient cause should appear for looking beyond them.

THOMAS A. HENDRICKS,
Commissioner of the General Land Office.

XXIV. A letter by William F. Steiger to Galusha Parsons, as follows:

WASHINGTON, D. C., *Feb.* 11, 1876.

GALUSHA PARSONS, Esq.

SIR: I have your favor of the fourth instant, requesting printed copy of my argument in the case of appeal from the Commissioner's decision relative to the swamp and railroad conflicts in Iowa, now before the Secretary of the Interior. I regret that I have no printed argument in the case, or would cheerfully send you copy. The Hon. Jas. F. Wilson, of Fairfield, Iowa, has filed several, and beg leave to refer you to him for copies. You refer particularly to the swamp selections in Buena Vista county, which you represent under authority from the Governor. In reply to your question whether

121 we claim on behalf of the railroad only the dry lands, and not those actually swamp, I would state, since it appears on examination that the selections were made and filed after the approval of the lands situated in the odd-numbered sections to the Dubuque & Pacific railroad and branch Dec. twenty-nine, 1858, we hold that they are *res adjudicata*, and not open to contest.

Very respectfully, WM. F. STEIGER.

XXV. The decision of the Secretary of the Interior upon defendant's appeal, hereinbefore printed as "Exhibit E," pages seventy-three to seventy-six.

XXVI. A letter by the Commissioner of the General Land Office to Galusha Parsons, as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, *August* 30, 1876.

Hon. GALUSHA PARSONS, *Des Moines, Iowa.*

SIR: I enclose herewith a copy of the decision of the Acting Secretary of the Interior, under date of twenty-fourth instant, on appeal from the decision of this office, dated July seventh, 1875, relative to the question of the consideration by this office of the claim of the State of Iowa for swamp lands approved to said State under railroad and other grants. Please acknowledge receipt thereof.

Very respectfully,

J. A. WILLIAMSON,
Commissioner.

Enclosed "Exhibit E," printed pages 73–76.

122 And thereupon the defendant offered the following evidence, which was received by the court subject to plaintiff's objections to the incompetency thereof, and that there was no issue herein to which the same was relevant. No ruling was made upon the objections, but the evidence was received, and upon the consideration of the cause was held competent, and plaintiff's exceptions noted.

I. An act of Congress approved May fifteenth, 1856, as follows:

An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That there be and is hereby granted to the State of Iowa, for the purpose of aiding in the construction of railroads from Burlington, on the Mississippi river, to a point on the Missouri river near the mouth of the Platte river; from the city of Davenport, *via* Iowa City and Fort Des Moines to Council Bluffs; from Lyons City, northwesterly, to a point of intersection with the main line of the Iowa Central Air Line railroad, near Maquoketa, thence on said main line, running as near as practicable to the forty-second parallel across the said State to the Missouri river, from the city of Dubuque to a point on the Missouri river near Sioux City, with a branch from the mouth of the Tete Des

Morts to the nearest point on said road, to be completed as soon as the main road is completed to that point, every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the Governor of said State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections or parts of sections, as shall be equal so such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid; which lands (thus selected in lieu of those sold and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections, designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the State of Iowa for the use and purpose aforesaid: Provided, That the
123 land to be so located shall, in no case, be further than fifteen miles from the lines of said roads, and selected for and on account of each of said roads: Provided further, That the lands hereby granted for and on account of said roads severally shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: And provided further, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

II. An act of the General Assembly of the State of Iowa, approved July fourteenth, 1856, as follows:

An act to accept of the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled an act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State, approved May 15th, 1856.

SEC. 1. Be it enacted by the General Assembly of the State of Iowa, That the lands, rights, powers, and privileges granted to and conferred upon the State of Iowa by the act of Congress entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of railroads in said State, approved May fifteenth, 1856," be, and the same are hereby, accepted upon

the terms, conditions, and restrictions contained in said act of Congress.

SEC. 5. That so much of the lands, interest, rights, powers, and privileges as are or may be granted and conferred, in pursuance of the act of Congress aforesaid, to aid in the construction of a railroad from the city of Dubuque to a point on the Missouri river at or near Sioux City, with a branch from the mouth of the Tete Des Morts to the nearest point on said road, to be completed as soon as the main line is completed to that point, are hereby disposed of, granted, and conferred to and upon the Dubuque & Pacific Railroad Company, a body corporate, created and existing under the laws of the State of Iowa.

III. An act of the General Assembly of the State of Iowa, as follows:

124 An act resuming certain rights conferred upon the Dubuque and Pacific, now Dubuque and Sioux City, Railroad Company, by an act approved July fourteenth, 1856, and acts amendatory thereof, and to repeal certain laws in relation thereto.

SECTION 1. Be it enacted by the General Assembly of the State of Iowa, That all the right, title, or interest in and to the land heretofore granted or intended to be granted to the Dubuque and Pacific, now Dubuque and Sioux City, Railroad Company, by an act approved July fourteenth, 1856, entitled "An act to accept the grant and carry into execution the trust conferred upon the State of Iowa by an act of Congress entitled 'An act making a grant of land to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State, approved May fifteenth, 1859,'" and acts amendatory and supplementive of the same, be, and the same is hereby, absolutely and entirely resumed by the State: Provided, however, That nothing in this act contained shall be construed to affect, or in any manner impair, the title of said company to the one hundred and twenty sections of said land for each and every twenty miles of their road which is now completed and equipped.

SEC. 2. The fifth section of said act approved July fourteen, 1856, and all other acts and parts of acts inconsistent with this act are hereby repealed.

SEC. 3. This act, being deemed of immediate importance, shall take effect and be in force from and after its publication in the Iowa State Register, published at Des Moines, and the Iowa North-West, published at Fort Dodge, Iowa.

Approved March tenth, 1868.

IV. An act of the General Assembly of the State of Iowa, as follows:

An act to legalize, confirm, and carry out a contract between the Dubuque & Sioux City Railroad Company and the Iowa Falls & Sioux City Railroad Company, and to extend the time for completing said railroad from Dubuque to Sioux City; to grant certain lands to the Dubuque, Bellevue and Sabula Railroad Company for the building of the Tete Des Morts branch, and for other purposes.

SECTION 1. Be it enacted by the General Assembly of the State of Iowa, That a contract entered into between the Dubuque & Sioux City Railroad Company, of the first part, and the Iowa Falls & Sioux City Railroad Company, of the second part, transferring so much of the Dubuque & Sioux City railroad as remains to be constructed, together with the franchises, right of way, depot grounds, and other appurtenances of said road to be completed, also transferring all right and title of the said Dubuque & Sioux City Railroad Company to so much of the lands granted by Congress to aid in the construction of said road as shall appertain to or be legally applicable to the construction of the uncompleted part of the Dubuque & Sioux City railroad as aforesaid, except as to the lands hereinafter granted to the Dubuque, Bellevue & Sabula Railroad Company, be, and is hereby, legalized and confirmed.

SEC. 2. That the *pro rata* of six sections of land per mile reserved by said contract to the Dubuque & Sioux City Railroad Company, and the *pro rata* of six sections per mile conveyed by said contract to said Iowa Falls & Sioux City Railroad Company, shall be adjusted between said companies as follows, to wit: The land actually conveyed to third parties shall be set apart to said Dubuque & Sioux City Company, not exceeding six sections per mile for the road now built, and if over that number of acres of land have been conveyed the excess over that amount shall be taken off of the west end of the last installment of the lands so conveyed; and in case less than that amount of lands have been conveyed as aforesaid, then a sufficient amount shall be taken to make up such *pro rata* from that portion of the land grant next adjoining and immediately west, as near as practicable, to the lands last conveyed by said Dubuque & Sioux City Railroad Company.

SEC. 3. That a *pro rata* of six sections per mile of said land grant be, and the same is hereby, granted to and conferred upon the Dubuque, Bellevue & Sabula Railroad Company to aid in the construction of said road known as the Tete Des Morts branch, required to be built by the act of Congress granting said lands to the State of Iowa. * *

SEC. 4. That so much of said land grant as is applicable to the uncompleted portion of the road as aforesaid, west of Iowa Falls, excepting the lands hereby granted to said Dubuque, Bellevue & Sabula Railroad Company, is hereby granted to and conferred upon the said Iowa Falls & Sioux City Railroad Company, subject to the terms and conditions of the act of Congress granting the said lands, dated the fifteenth day of May, A. D. 1856, and the act amendatory thereto, and the act of Congress passed at the present session; and also subject to the terms and conditions of this act as herein expressed. * * *

SEC. 5. Said lands so granted as aforesaid to the Iowa Falls & Sioux City Railroad Company shall be patented by the Governor to said company, as the same shall be earned by the building of said road. * * *

SEC. 7. * * * If the said Iowa Falls & Sioux City Railroad Company shall fail or refuse to accept of this grant upon the conditions hereby imposed, and in the time and manner as herein re-

quired, the census board of this State is hereby authorized, by proper writing with the seal of the State affixed thereto, to confer the same upon such party or company as shall in their judgment be competent to carry the enterprise. * * *

SEC. 8. Nothing in this act contained shall be construed to
126 affect in any way the titles, rights, or interests of persons or corporations not expressly named in this act.

Approved April 7, 1868.

V. A certified list of lands as follows:

Dubuque & Pacific Railroad and Branch.

List of lands in the district of lands subject to sale at Sioux City within the six-mile limits, granted to the State of Iowa by the act of Congress approved the fifteenth May, 1856, entitled "An act granting public lands in alternate sections to the State of Iowa to aid in the construction of certain railroads in said State, being the vacant and unappropriated lands in the alternate sections, designated by odd numbers, for six sections in width on each side of the railroad "from the city of Dubuque to a point on the Missouri river, near Sioux city, with a branch from the mouth of the Tete Des Morts to the nearest point on said road."

(Here follows a list of all the lands in controversy lying within the six-mile limits.)

GENERAL LAND OFFICE, *December* 23, 1858.

I, Thomas A. Hendricks, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages one to twenty inclusive, is a true and correct list of the tracts of land within the six-mile limits granted to the State of Iowa by the act of Congress approved May fifteenth, 1856, entitled "An act making a grant of of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State, being the vacant and unappropriated lands in the alternate sections, designated by odd numbers, for six sections in width on each side of the Dubuque & Pacific railroad and branch within the State of Iowa, and they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of said act of May fifteenth, 1856, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.
127 In testimony whereof, I have hereunto subscribed my name, and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year first herein above written.

[SEAL.] THOMAS A. HENDRICKS,
Commissioner.

DEPARTMENT OF THE INTERIOR, *December* 27, 1858.

Approved, subject to the conditions and rights above mentioned.

J. THOMPSON, *Secretary.*

VI. A certified list, as follows:

Dubuque & Pacific Railroad and Branch.

List of lands in the district of lands subject to sale at Sioux City, outside of the six and within the fifteen-mile limits of the reserve, to satisfy the grant made to the State of Iowa by the act of Congress approved the fifteenth May, 1856, entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State, being the land selected by the agent of the Governor of the State of Iowa from the lands of the United States, in alternate sections and parts of sections, designated by odd numbers, nearest to the tiers of sections within six sections in width on each side of the railroad 'from the city of Dubuque to a point on the Missouri river, near Sioux City, with a branch from the mouth of the Tete Des Morts to the nearest point on said road, and in lieu of the lands in the alternate sections, designated by odd numbers, within said six sections in width, which the United States had legally 'sold or otherwise appropriated, or to which the rights of pre-emption have attached."

(Here follows a list among others of all the lands in controversy in this action lying within the limits aforesaid.)

128 At the end is the following certificate:

GENERAL LAND OFFICE, *December* 23, 1858.

I, Thomas A. Hendricks, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages one to twenty-six inclusive, is a true and correct list of the tracts of land selected by the agent of the State of Iowa, outside of the six and within the fifteen mile limits, under the act of Congress approved May fifteenth, 1856, entitled "An act making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in said State," the said selections being from the lands of the United States in the alternate sections, designated by odd numbers, most contiguous to the tiers of sections within six sections in width on each side of the Dubuque & Pacific railroad and branch, and being in lieu of the land in the alternate sections designated by odd numbers, within said six sections in width on each side of said road, which the United States had legally sold, or to which the right of pre-emption had legally attached, prior to the period at which the rights of the State inured under said grant; and they are now submitted for the approval of the Secretary of the Interior, in accordance with the requirements of said act of May fifteenth, 1856, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list.

In testimony whereof, I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed, at the city of Washington, on the day and year herein above written.

[SEAL.] THOMAS A. HENDRICKS,
Commissioner.

DEPARTMENT OF THE INTERIOR, *December* 27, 1858.
Approved, subject to the conditions and rights above mentioned.
J. THOMPSON, *Secretary.*

129 VII. Two patents from the State of Iowa, as follows:

To all to whom these presents shall come, Greeting:

Whereas chapter 124 of the Acts of the Twelfth General Assembly of the State of Iowa provides for patenting to the Iowa Falls & Sioux City Railroad Company certain lands granted by act of Congress, approved May fifteenth, 1856, upon compliance by said company with the conditions of said act of the General Assembly; and whereas the said railroad company, in virtue of a compliance with the conditions imposed by said act of the General Assembly is entitled to a conveyance of the following described lands situated in Buena Vista county, Iowa, and certified to the State under said act of Congress, to wit: [Description.] Now, therefore, I, Samuel Merrill, Governor of the State of Iowa, in consideration of the premises and in conformity with the aforesaid act of the General Assembly, do hereby convey unto the said Iowa Fall & Sioux City Railroad Company, and to their assigns, the tracts of land heretofore described, to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Iowa Falls and Sioux City Railroad Company, and their assigns, forever.

In testimony whereof, I, Samuel Merrill, Governor of the State of Iowa, have caused these letters to be made patent, and the great seal of the State of Iowa to be hereunto affixed, given under my hand at Des Moines, the fifth day of July, in the year of our Lord one thousand eight hundred and seventy-one, and of the State of Iowa the twenty-fifth.

[SEAL.] SAM'L MERRILL.

By the Governor:

ED. WRIGHT, *Secretary of State.*

I certify that the foregoing deed is recorded in vol. A, pages 252, 253, and 254.

AARON BROWN,
Register of State Land Office.

Recorded in Buena Vista county, book E of deeds, page 206, August seventeenth, 1871.

130 To all to whom these presents shall come, Greeting:

Whereas chapter 124 of the Acts of the Twelfth General Assembly of the State of Iowa provides for patenting to the Iowa Falls & Sioux City Railroad Company certain lands granted by act of Congress, approved May fifteenth, 1856, upon compliance by said company with the conditions of said act of the General Assembly; and whereas the said railroad company, in virtue of a compliance with the conditions imposed by said act of the General Assembly, is

entitled to a conveyance of the following described lands situated in Buena Vista county, Iowa, and which have been approved and certified to the State under said act of Congress, to wit: [Description.] Now, therefore, I, Samuel Merrill, Governor of the State of Iowa, in consideration of the premises and in conformity with the aforesaid act of the General Assembly, do hereby convey unto the said Iowa Falls & Sioux City Railroad Company, and to their assigns, the tracts of land heretofore described, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Iowa Falls & Sioux City Railroad Company, and their assigns, forever.

In testimony whereof, I, Samuel Merrill, Governor of the State of Iowa, have caused these letters to be made patent, and the great seal of the State of Iowa to be hereunto affixed, given under my hand at Des Moines, the tenth day of August, in the year of our Lord one thousand eight hundred and seventy-one, and of the State of Iowa the twenty-fifth.

[SEAL.] SAM'L MERRILL.

By the Governor:

ED. WRIGHT, *Secretary of State.*

I certify that the foregoing deed is recorded in vol. A, pages 283 and 284.

AARON BROWN,
Register State Land Office.

Recorded in Buena Vista county, book E of deeds, page 282, August thirty-first, 1871.

131 LAURENCE REGAN was then sworn as a witness upon the part of the defendant.

Before any testimony was given, plaintiff objected to any parol evidence as to the character of the lands, on the grounds:

1. The defendant sets up no title in its answer, or claim of right to the lands.

2. Parol evidence is not competent in favor of a party who has had an opportunity to give evidence before the officers of the Land Department of the General Government and who has declined to do so.

3. It is admitted by the pleadings that the defendant appeared before the officers of the Department on application of the plaintiff to take up its list then on file in the office of the Secretary of the Interior, and declined to give evidence as to the character of the lands, and appealed from the decision of the Commissioner of the General Land Office to take up said list for examination, upon the sole ground of a want of jurisdiction in that officer to examine, allow, or certify the same, as appears by the notice of appeal and the allegations of the reply not denied by the defendant.

4. Upon the ground that plaintiff's answer setting up title has been tried and adjudicated against it, both by this court and the supreme court upon appeal.

As to Mr. Cook's testimony, plaintiff objects to it, in relation to the payment of taxes, on the ground that such payment if made does not constitute a proper claim against the plaintiff in this case.

These objections were not ruled upon, but reserved until the final consideration of the cause, and then overruled, to which defendant duly excepted.

The witness Regan thereupon testified as follows:

I am about fifty-nine years of age; land surveyor by occupation, and have been for years; I was land surveyor in Ireland, and have been about thirty-seven years in the United States; I have been sixteen or eighteen years county surveyor in Boone county, and
132 I have surveyed in Story county and Dallas; Greene, the most of Greene, the most part of Webster, nearly all of Carroll, and the most part of Monona, nearly half of Buena Vista, and the county east of it, a good deal; the most of Hamilton and Hardin, and a couple of counties more, convenient to them; I couldn't tell you the names. I have had long experience in the examination of swamp lands in Iowa, twenty-four years; made a survey of the lands claimed by the defendant in this case in 1877; I commenced about the eighth of June, I think, and continued something about forty days, or thereabouts; perhaps more or less. I had with me Mr. Deloss and Mr. Petit at that time; some weeks after that I changed Mr. Petit and got Robert Cummins. My manner of making the survey was, first, to determine the corners of each tract, and when I found the land in all places, I surveyed the entire forty correctly—all the wet or overflowed land. This, in every case, was accurately chained and surveyed, unless where there was a forty that had no wet or overflow on it, then we rode around that, by testing a wagon wheel testing it first, and by measuring that; it meant just the same as the chain; but in no place using it unless where there was not any wet, or anything to be deducted.

90. 36.

Section 17. I here produce the sw of the nw; the se nw 24 acres dry tillage land all fit for cultivation. The balance, sixteen acres, good meadow land; surveyed in June, 1877, and which was the description at that time. Here are the lengths and breadths and chains of all the wet, and here is the dry: nw sw twenty-nine and two-tenths acres, dry tillage land, fit for cultivation, and ten acres and eight-tenths splendid level grass land. This was also surveyed in a very wet time.

Section 19. Nw ne thirty-six acres and two-tenths the very best quality of tillage land, all high, dry, and rolling; sw ne thirty-two acres of dry, rolling lands, as good, I say, as there are in the county; se ne thirty-six acres and four-tenths fine, dry, rolling land, all fit for cultivation; nw se twenty-four acres first-class high, dry, rolling land.

Section 29. Sw nw twenty-two and one hundredth acres
133 high, dry tillage land fit for cultivation; the balance mostly good meadow.

91. 96.

Section 17. Nw sw thirty-four acres of first-rate high, dry land, fit for cultivation; six acres splendid meadow.

Section 19. Se ne twenty-five acres and seven-tenths good tillage land, all fit for cultivation, and the balance slough and a pond; nw nw twenty-seven acres, and this is high, rolling ground, fit for corn. The land is very rolling and bluffy along the creek; ne se thirty-five acres and a half first-class high, dry, rolling land, all fit for cultivation in any season, and three and one-half acres of very dry meadow, and four and one-half acres of slough land; nw se thirty-three and sixty hundredths high, dry, rolling land, as good as any in the county.

Section 29. Sw nw thirty-three acres high, dry land, fit for cultivation; nw sw thirty acres dry land, and ten acres a good meadow; sw sw contains thirty acres and eighty-seven hundredths of the very best quality of land fit for cultivation.

Section 31. Ne ne twenty-seven acres and forty-two hundredths good dry land, fit for cultivation, the balance first-rate meadow; nw sw, this is a fraction, contains forty-four acres and eighty hundredths by the Government survey, and all that is good land, fit for cultivation; sw sw, by the Government, forty-five acres—my survey gives forty-four and three-tenths high, dry, rolling land; se se twenty-seven acres high, dry land, fit for cultivation, the balance good meadow; nw nw all high, dry, rolling land, fit for cultivation—no slough nor swamp on it; ne nw thirty acres of first-class quality of land, fit for cultivation, high and rolling, the balance ten acres high, dry meadow land.

92. 36.

Section 7. Sw nw thirty-three and one-half high, dry land, fit for cultivation in any season; se ne twenty acres and seventy-seven hundredths of very good dry land in any season, all of which is very high, about fifteen feet higher than the slough on the east side of it.

134 Section 19. Nw ne is all first-class land, all fit for cultivation; it is one of the best forties in the township; sw ne is all high, dry, and rolling—no swamp nor slough on it; se ne thirty-five acres and eighty hundredths good dry land fit for cultivation, the balance is small ponds; nw se thirty-three acres and six-tenths first-rate tillage land; more than twenty acres of this lies very high and rolling; sw ne twenty-one acres and sixty-two hundredths first-class high, dry land: twenty acres of this is so high as not to get overflowed, the balance is mostly very good meadow; se se thirty-nine acres and six-tenths, all of which is fit for cultivation in any season, but one small little pond on it.

Section 31. Sw ne twenty-six acres high, dry tillage land, the balance good meadow; nw sw, this is fractional, by the Government survey thirty-nine and seven-hundredths, of which thirty-seven is first-class land for cultivation, all high and dry, the balance is a little wet run; se se twenty-one acres of dry land, somewhat level, this amount is fit for cultivation, and the balance first-class meadow.

93. 36.

Section 19. Sw sw—this is fractional—by Government survey thirty-seven and six-tenths, of which thirty-four and twenty-seven hundredths is very good land for cultivation—it is very high and rolling, the balance is in a wet run; nw se thirty-seven acres of first-rate land for cultivation—this is very high and dry; there is a small run through this forty that always drains it.

Section 31. Nw sw, by the Government survey thirty-seven and one-half, of which there are thirty and three-tenths very good land for cultivation. This land is gently rolling, the balance meadow lands; sw sw, by Government survey thirty-seven and one-half, of which thirty-two and four-tenths are very good dry lands, fit for cultivation, the balance first-rate meadow.

90. 37.

Se ne, thirty-six acres and six-tenths of first-rate high, dry lands, fit for cultivation in any season, the balance good meadow.

Section 3. Lot No. 4, being described as the sw sw by the
135 Government survey, 52 acres, of which 26 acres and seventy-seven one-hundredths are very high and dry, all fit for cultivation. At the time this was surveyed a great deal of good land was taken away by Storm lake. Good lands have been submerged; have been made swampy; in fact, since the Government survey.

Mr. KIDDER: Go over and state fully about that; how much there was in respect to that that was washed away; rather, what was swampy and what remains dry.

Twenty-six seventy-seven hundredths acres; a little more than the original, twenty-two chains and forty links washed out that was originally good land, for it took away large rocks that was there that was protecting the land; now it washes out.

COURT: What is your estimate of the amount that has washed into the lake that was then dry land?

I would estimate that about five acres.

COURT: So that originally, at the time of the Government survey, there was something over five acres of dry land there?

Yes.

Section 5. Sw nw twenty-three acres and a half of splendid meadow land; no slough or swamp on this part; it would be good for cultivation in wet seasons; nw sw thirty-two and four-tenths of first-rate high, dry land, under cultivation; the balance is first-rate meadow land; sw sw thirty-six acres of very nice land; no slough or swamp on it; there are twelve acres under cultivation; the balance, four acres, is in a slough, wet land.

Section 9. Lot 1, by the Government survey eighteen and three-tenths, of which there are now eighteen and three-tenths of first rate high, dry, land, all under cultivation. There is a fine grove planted on the north side, and this bank of the lake is from three to ten feet higher than the water. Lot No. 2, by the Government survey twenty-two and one-half, of which seventeen and forty-seven one-hundredths is first-class land, dry and rolling, all of which is under cultivation, and five acres plowed.

Section 11. Lot No. 4, by the Government survey thirty-
136 eight and eight-tenths, in which there are now nineteen and eight-tenths fit for cultivation; never was or could be overflowed.

Section 25. Ne ne thirty and seven-tenths of good high, dry land fit for cultivation; the balance is a wet run; se se thirty-one acres of first-rate land for cultivation.

Section 31. Se ne is all first-class land, all under cultivation; no slough, swamp, nor any meadow land on this forty.

Section 7. Nw nw all the very best quality of land, high, dry, and rolling, half of it under cultivatson; one of the best forties in the county; ne nw thirty-eight and one-fourth of the very best quality of tillage land, all high, dry, and rolling, the balance good meadow; nw nw all high, dry, and rolling, all under cultivation. This land can't be excelled.

Section 31. Ne ne thirty-two and seventy-eight one-hundredths of first-class high, dry land for cultivation, the balance good meadow; nw ne thirty-four and one-fourth of good, high, dry, rolling land for cultivation, the balance good meadow; se ne thirty-five and forty-five hundredths of very good land for cultivation, the balance is good meadow land; nw sw thirty-nine and three hundredths of good dry land, the most of which is under cultivation and plowed, the balance splendid meadow; sw sw thirty-one and seven-tenths of good land for cultivation in any season—rolls to the west—the balance is good meadow; ne se thirty-five and one-half of dry land—good dry land, on the southeast this forty is very dry and rolling, the balance is good meadow.

91. 37.

Section 1. Se sw twenty-three and eighty-two hundredths acres of very good dry land for cultivation, the balance is good meadow land; se se twenty-nine and thirty-one hundredths acres of good, high, dry land for cultivation in any season.

Section 3. Ne ne is a fractional forty, and contains by the Government survey thirty-seven acres, of which twenty-three fifty-nine hundredths is good, high, dry land for cultivation, more than twenty acres of this is very dry, the balance good meadow; se ne
137 thirty-six and forty-five hundredths acres of good land for cultivation, the balance good meadow; ne se twenty-nine and seven tenths acres of very good dry land for cultivation in any season, this land rolls; se se thirty and fifty-seven hundredths first-class, high, dry land, all good for cultivation.

Section 11. Ne ne thirty-five and four-tenths of very good, high, dry, rolling land, all good for cultivation, the balance is in a wet run, that always drains the good land; se sw twenty-two and eighty-eight hundredths acres of very good dry land for cultivation, this land never was swampy, for it is too high; ne sw thirty-six and eighty-three hundredths acres of good land for cultivation, the most of it very high and rolling, the balance good grass land; ne se thirty-two and two-tenths acres of very good land for cultivation, half of the balance is very good meadow land.

Section 13. Ne ne thirty-seven and forty-five hundredths acres of very good, high, dry, rolling land, the balance is wet; sw sw thirty-eight and four-tenths acres of good, dry tillage land, the balance is wet runs; se se thirty-five and forty hundredths acres of good dry land for cultivation, the balance good meadow.

Section 15. Ne ne thirty-five and seven-tenths acres of good high, dry land for cultivation, the balance is slough; nw ne thirty-six and two-tenths acres of very good land for cultivation, rolling, thirty acres is in cultivation with wheat and corn; sw nw twenty-two acres of very good dry land, all good for cultivation, the most of the balance is good meadow.

Section 17. Sw se twenty-three and eight hundredths acres of good dry tillage land, the balance is meadow; se se twenty-two and five hundredths acres of good dry land for cultivation, the balance about half of it good meadow land.

Section 21. Se se twenty-five and twelve hundredths acres of high, dry rolling land, all for cultivation, half of the balance is good meadow.

Section 23. Se sw thirty-five and sixty-five hundredths
138 acres of high, dry land, the balance is along a creek, on its edges this is splendid land.

Section 25. Se ne thirty-six and three-tenths acres of good dry tillage land, the balance is in small brushy ponds; se nw twenty-one and eight-tenths acres of dry tillage land for cultivation, of which eighteen and four-tenths acres are very high and rolling, the balance is mostly good meadow; ne se twenty-six and forty-five hundredths of very good high, dry, rolling land, the balance is good meadow land.

Section 27. Sw ne thirty-four and three-fourths acres of good dry land for cultivation, the balance is good meadow land; ne sw thirty-three and ninety-five hundredths acres of good tillage land, twenty-two of it is very high and rolling and fifteen acres under wheat, the balance of the thirty-three, about nineteen acres, is low; nw sw twenty-eight and seven-tenths acres of good dry land for cultivation, the balance is good meadow land.

Section 35. Ne ne thirty-three and one-tenth of dry land for cultivation, the most of the balance is good meadow land; nw ne thirty-two and three-tenths of first rate high, dry land, generally rolling, the balance is in a wet run which drains off the good land; se nw thirty and three-tenths of good tillage land, on which there are fourteen acres under wheat. The balance is good meadow except the pond that is on it; ne se thirty and eighty-seven one-hundredths of first-rate high, dry land, for cultivation; the sw se thirty-three and thirteen one-hundredths of good, high, dry, rolling land, four acres in a deep slough, two acres very good meadow; the se se contains thirty-four and forty-five one-hundredths of good, high, dry land for cultivation, the balance is mostly good meadow land.

Section 17. Nw sw thirty-eight and one-half of good land for cultivation, all this is under cultivation at present; sw sw twenty-one and ninety-two hundredths of good land for cultivation of which

fifteen acres is under cultivation, the balance is very good meadow land.

Section 29. Sw se thirty-seven and three-tenths of good,
139 high, dry, rolling land for cultivation. There are five acres of wheat on the west of this, the balance is good meadow land.

Section 33. Ne ne thirty-five and thirty-nine one-hundredths of fair tillage land, all plowed. This land is moderately level, and grass and rosin weed neither grow nor could grow on wet land, neither rolling and wet nor rolling and dry. You would not see rosin weed in the pond or about it, always upon good rich land that would not be too wet or too dry. Nw se twenty and three-tenths of good dry land for cultivation, the balance meadow land; se sw thirty acres of very good dry land for cultivation, the balance good meadow.

92. 37.

Section 1. Ne ne, by the Government survey forty-six acres, whereof twenty-seven and four-tenths are high and dry for cultivation, the balance under a pond, meadow land. The se ne twenty-seven and four-tenths acres of dry land for cultivation; the most of this is high and rolling, the balance good meadow. The nw sw thirty-nine and eight-tenths acres of as good land as there is in the county for cultivation any season. There is a small slough in the ne corner.

Section 3. The ne ne, by the Government survey thirty-seven acres, of which thirty and forty-five hundredths acres is first class high, dry, rolling land for cultivation, balance good meadow. The sw sw contains thirty-five and sixty-six hundredths acres of very good dry land for cultivation. The balance would be wet wet seasons. At present four and thirty-three hundredths acres could be plowed at a time. Ne se twenty-two and eighty-three hundreths, very good tillage land for cultivation, the balance good meadow. There is a creek runs through that: it never could overflow, for it would be up the hill.

Section 7. Ne sw is all high, dry, and rolling, all for cultivation; no pond, no slough. Nw sw, by Government survey forty-four and eighty-eight hundredths is very good dry land for cultivation. Around this tract there is twenty-five or twenty-six acres of pond this year. Sw sw, by the Government survey forty-four and sixteen hundredths, of which thirty-eight and seventy-three hun-
140 dredths are high, dry, rolling land for cultivation. There are about twenty-five acres of corn on this tract. The balance is dry land at present, but would be wet in wet, bad weather. Sw sw thirty-eight and twenty-three hundredths of very good, high, dry land for cultivation; this never was or could be swampy. The balance in two small patches, now dry, but would be wet in wet weather.

Section 9. Ne ne twenty-seven and one-half acres good tillage land, gently rolling, good for cultivation, the balance splendid dry meadow. Ne nw thirty-eight and one-sixtieth acres very good, high, dry land

for cultivation; one and forty hundredths acres in a small run. Nw nw thirty-four and forty-five hundredths acres, all very high, dry, and rolling, the balance splendid meadow. Se nw thirty-eight, dry rolling land for cultivation, the balance, two acres, in a wet run.

Section 11. Nw nw thirty and thirty-seven hundredths acres of very high rolling land for cultivation, the balance slough. Ne sw twenty-seven and sixty-one hundredths acres, good for cultivation, all high and rolling, as good as there is in this county, the balance good meadow. Se sw thirty-seven and thirty-six hundredths acres good, high, dry, rolling land for cultivation, and the balance in small patches—beautiful dry meadow; that land is very high and rolling.

Section 15. Sw nw twenty-eight and fifty-five hundredths acres high, dry, rolling land; the balance is in what I would call wet runs. Ne sw thirty-eight and two-tenths acres high, dry, and rolling, the balance * * Nw sw thirty-six acres very good, high, dry land for cultivation, the balance good meadow land. Sw sw twenty-nine and two-tenths acres of very high, dry land for cultivation, the balance good meadow land. Se sw twenty-three and nine-tenths acres dry land for cultivation; this amount never was or could be slough; it is too high. Ne se thirty-six acres very good land for cultivation; this land is gently rolling.

Section 17. Sw nw thirty-nine and five hundredths acres, the very best quality of land for cultivation; it is very high and rolling;
141 the balance is in a little, small, wet run in the southeast corner; ne sw twenty-seven and three-tenths very good high, dry, rolling land for cultivation—this dry land is fifteen feet higher than the slough in general; nw sw thirty-six acres good high, dry, rolling land for cultivation; this land is from ten to fifteen feet higher than the slough, it never could be swampy—four acres in a wet run; sw sw thirty-five acres as good land for cultivation as there is in this county, that is high and rolling, the balance good meadow; se sw thirty-one and one-tenth acres, all high, dry and rolling, the balance good meadow.

Section 19. Nw nw contains by the Government survey forty-four and three-fourths acres, of which twenty-eight and seventy-one hundredths is good land for cultivation, the balance sloughy; nw sw by the Government survey is forty-four and one-half acres, thirty-eight and twenty hundredths is the very best quality of high, dry, rolling land, on which there are sixteen acres of wheat and corn; se sw thirty-five and fifteen hundredths very good, high and dry land for cultivation, the balance is good meadow; se nw thirty-six acres good, high, dry land, the balance, four acres, good meadow land.

Section 21. Se ne twenty-five and fifty-five hundredths acres high, dry land for cultivation in any season, the balance is under a pond; ne se twenty-nine and three-fourths acres very good dry land for cultivation, the balance good meadow land.

Section 27. Ne ne thirty-three and six-tenths acres very good high, dry, rolling land for cultivation; nw sw thirty-nine and

ninety-five hundredths acres the very best quality of land for cultivation—all high, dry and rolling—any season, a small patch on the west side.

Section 29. Se sw thirty-one and two-tenths acres good high, dry land for cultivation; Colonel Moore has got a farm adjoining on to west of this; se se thirty-four and thirty hundredths acres high, dry land for cultivation, about twenty-three acres of this is very high and dry, about half of the balance very good meadow.

Section 35. Nw nw thirty-three and one-tenth of good land
142 for cultivation, it is high and dry and can be cultivated any season, the balance very best quality of meadow land.

93 37.

Section 1. Nw sw twenty-two and three-fourths, nineteen acres of which is on a high bluff north of Sioux Rapids, the balance good pasture.

Section 3. Sw nw twenty-three and ninety-five hundredths of very good high, dry land for cultivation, the balance except the bed of the Sioux river is splendid land, but might overflow in very wet weather, the land on the east and south sides is thirty feet higher than the Sioux; ne se twenty-six and one half acres of very good rolling land for cultivation, this twenty-six acres is as dry and rolling as any in the county, it is splendid land, it is about twenty feet higher than a certain little creek—there is a little creek comes in down there; it is very bluffy, very high and bluffy.

Section 7. Nw nw twenty-seven and twenty-three hundredths acres of high, dry land for cultivation, the balance is under Little Sioux, it is overflowed.

Section 13. Nw nw thirty-nine acres of the very highest land in the county, this land never could overflow it is too bluffy.

Section 19. Nw nw contains by the Government survey forty-eight and sixty-two hundredths acres, of which twenty-six acres is first-class land—rolling—for cultivation, high, dry land, is very high above the slough, the balance is mostly meadow.

Section 25. Se ne thirty-two acres of very high, dry, rolling land, this is generally from ten to twenty feet higher than a slough that is on the west side, the balance is meadow; se se thirty-six and one-half acres of high, dry land for cultivation, this is as good land as you can scare up in the county.

Section 29. Nw nw twenty-one and sixty-five hundredths of high, good land, it is high and rolling to the east, this is generally high above the slough, the balance meadow land; sw sw, I very carefully surveyed this forty; the south line is only nineteen chains and eighty-two links, therefore is eighteen links short of forty,
143 only makes thirty-nine and sixty-four hundredths, of which nineteen and fifty-nine hundredths is under—wait a moment—sixty-five hundredths.

Section 33. Ne sw twenty-nine and ninety-two hundredths good land, of which seventeen acres is very good land for cultivation, and twelve and ninety-two hundredths dry meadow land without any wet or slough thereon, the balance is meadow land; nw nw twenty-

nine and fourteen hundredths of good, dry land for cultivation, the balance is good meadow land; sw sw thirty and eleven hundredths of good, dry land for cultivation, the balance good meadow land; ne ne thirty and one-fourth of good, dry land for cultivation, the balance good meadow; nw sw contains thirty acres and one-fourth good, dry land, balance in meadow; se se twenty-four and twenty-two hundredths good high, rolling land, balance good meadow.

Section 35. Sw sw twenty-four and ninety-eight hundredths acres good land for cultivation, it is very high above the slough and never was or could be overflowed in that corner; ne se thirty-two and sixty hundredths acres good dry land, gently rolling, for cultivation, the balance in small wet patches as depicted on this plat; nw se thirty-seven and seventy-three hundredths dry land, the balance in small ponds—they were dry—this land rolls gently, but is somewhat level.

Section 5. Sw sw twenty-one and forty-six hundredths very good dry, rolling land, twenty and one-half of it is under cultivation; I might say this also could not overflow. I tell you honestly it is not an opinion, any man who was on top of that hill would know: it is north of Sweet's mill, if you know where it is, it is land that never overflows.

Section 1. Se ne thirty-two and forty-three hundredths good land, there are fifteen acres under cultivation at present, and seventeen acres in the creek bluff about a quarter of a mile north of Sioux rapids.

96. 38.

144 Section 7. Ne ne thirty-six acres good land for cultivation, the balance good meadow land i a wet run; se ne thirty acres very good dry, rolling land, nearly all plowed, three acres of wheat thereon, the balance in a wet run.

Section 9. Sw sw thirty and one-tenth acres very good dry land, all under cultivation, this thirty is of a superior quality, balance in a wet run; se sw contains —— acres, all very high, dry, rolling, land under cultivation, a good dwelling-house on this forty, occupied by a Mr. Tyler.

Section 11. Ne se thirty-five and fifty hundredths acres good fine, rolling land for cultivation; has a slough or wet run that always drains the dry land.

Section 19. Nw ne thirty-eight and sixty hundredths acres, high, dry land, all under cultivation, a good dwelling-house on it, fences and other improvements thereon; sw ne twenty-eight and ninety-five hundredths acres, very good tillage land, which twenty and eighty-seven hundredths is in wheat at present, balance good meadows; se ne twenty-eight acres, mostly high, dry, rolling land for cultivation, the balance the best quality of meadow.

Section 21. Nw ne thirty-six and three-fourths acres very good, high, dry land, all under cultivation, and a good dwelling house and other improvements, Charles Yetzmire; se ne is all good, high, dry land for cultivation in any season, this forty is all under improvement; sw nw thirty-eight acres very dry level land, all would

be for cultivation, no slough nor overflow to this thirty-eight acres, balance two acres on a small creek three feet wide in the bed; se nw thirty-five and fifty-eight hundredths acres good bottom land, all for cultivation, this is perfectly dry land, balance under a small creek.

Section 25. Ne nw is all good land for cultivation, all this is at present under cultivation, no swamp or slough or overflow on this tract; nw nw thirty-six and forty-one hundredths fair land for cultivation, all of which is now under wheat, all this thirty-six acres is good, and six acres, although under wheat, is flat; sw sw all very good, high, dry land for cultivation, it is at present all under good cultivation, and has a good dwelling-house and other improve-
145 ments, Mr. Koran lives on it; se sw thirty-five and thirty hundredths acres good for cultivation, the thirty-five acres is all at present under cultivation.

Section 29. Sw se thirty-seven and forty hundredths acres good, high, dry land for cultivation in any season, the balance is in a small creek about four feet wide, that always drains the other land; se se thirty-six and three hundredths acres good, high, dry land, there is about twenty-five acres of this under cultivation, balance under small wet runs.

Section 13. Se ne thirty-six and seven-tenths acres good tillage land, all dry and for cultivation; on this tract there is a good dwelling-house and out offices; land all under cultivation, except the meadow part; Henry Otin lives on it.

Section 15. Nw ne thirty and eight-tenths good, dry land for cultivation, twenty-five and eighty hundredths of this tract under wheat, the balance along the Maple, and the wheat along its edges; se nw thirty-five and sixty-hundredths acres dry land, bottom land for cultivation, except in extreme wet weather, this can rarely overflow from the creek only five or six feet, no slough or pond on this tract; nw sw twenty-eight acres, I think it is good, dry, level land for cultivation, ten acres in a slough, one and one-twelfth under the Maple, and wet along the edges.

91. 38.

Section 27. Ne ne thirty-nine and seven-tenths acres dry, rolling land; this is one of the best forties in the county; the Illinois Central runs through it at Alta.

93. 38.

Section 11. Ne sw, all high, dry, rolling, fit for cultivation, there is ten of it above the Sioux river, this is one of the best forties in the county; sw sw twenty-one and seventy-three hundredths acres of good, high, dry, second bottom land for cultivation; this land is guarded from overflow by a bank of five feet higher than the first bottom; this is the second bottom; there it is six feet higher than the bayou, so that it is clearly impossible for it ever to overflow; the balance good meadow; the bank is a natural bank.

Section 5. Sw sw twenty and twenty hundredths acres, all
146 as good land for cultivation as in the county, all the good land is on high ridges, very high above a slough that is

nearly in the center; se se twenty-nine acres good, high, dry, rolling land for cultivation; a man named Stephen Tucker lives on this.

Section 17. Sw nw thirty-five acres high, dry land for cultivation; this land is very high over the creek that is represented on this plat, the balance good meadow land.

Section 25. Ne ne thirty-nine and one-half acres very high, dry, rolling land, this is superior land, all under cultivation; ne se twenty-three and ninety-five hundredths acres first-rate high, dry land for cultivation, twenty and one-fourth is already under wheat, the balance first-class grass land; the Illinois Central touches the southwest corner of this.

Section 27. Sw nw twenty and sixty hundredths acres dry land for cultivation, whereof sixteen is very good and dry, the balance is good land, mostly too dry for meadow land, it is somewhat too dry for meadow and too wet for cultivation; nw sw, all very good, high, dry land for cultivation; se se thirty-eight acres good land, high, dry, and rolling, thirty-two acres of this under wheat, corn, and oats, as good as there are in the county, the balance under a wet run.

Section 31. Ne se thirty-four and fifty-five hundredths acres the very best land, high, dry, and rolling, for cultivation in any season, the balance good meadow; nw se is all high, dry, rolling land, not one rod in it but what is fit for cultivation in any season.

92. 38.

Section 13. Nw ne thirty eight and seven one hundredths acres high land as is in the county, very high, dry land, and ninety-seven one-hundredths slough in the ne corner; sw ne thirty-eight and three-tenths very high, dry, rolling land, the balance in a small wet run; se ne thirty-seven and eighty one-hundredths good land for cultivation, twenty-five acres under wheat, corn, and potatoes, and a good dwelling-house and other improvements, a man named Johnson lives on it; sw sw thirty-three and four one-hundredths acres very high, dry, rolling land for cultivation, this land is very high above Brook's creek; se sw thirty-three and ninety-three hundredths acres of very high, dry land for cultivation in any season, this is about twenty feet higher than Brook's creek and never could overflow, balance goodmeadow, except what is under the bed of the creek; nw se thirty-nine and one-tenth acres of the very best land and never was or could be swampy, or overflow, quite bluffy; sw se thirty-four and ninety-five hundredths acres of very high rolling land, the balance is good meadow.

147

Section 15. Sw sw thirty-eight and sixty-six hundredths acres of high, dry, rolling land for cultivation in any season, one and thirty-three hundredths good meadow, this land cannot be excelled in State; se sw twenty-seven and fifty-eight hundredths acres all as good land for cultivation as there is in the county, it is high, dry, rolling, the balance is good meadow land.

Section 25. Nw ne twenty-nine and twenty hundredths acres of high, dry land for cultivation, there are ten acres wheat and oats on this tract; se se twenty-three and ninety-three hundredths acres of

the very best quality of land, this lies very high over the creek and is good land for cultivation.

Section 27. Ne ne thirty-four and sixty-seven hundredths of good, high, dry, rolling land, best quality for cultivation, twelve acres wheat on it; Kluger lives on this tract; Skrover owns two acres and a house, which he says is worth $1,200.

Section 33. Sw ne thirty-nine and seven-tenths acres of as good land as I have seen in the county for cultivation; se ne thirty-nine and sixty-three hundredths acres of good, dry land for cultivation, the balance first rate meadow, no ponds on this tract.

Section 35. Se ne all high, dry, and rolling, thirty acres of it under the best wheat I ever saw; seven acres plowed also on the south side, this forty is fully twenty feet higher than the slough that is on the forty south; Peter Peterson owns that tract.

Mr. KIDDER: Had any of this land in respect to which you have testified been ditched or drained or changed in any manner, so far as to being wet or dry or overflowed, from its natural condition?

148 No ditches or draining or any artificial means have been used on any of it so far as I have seen; that is, so far as ditching or draining is concerned.

Could you state whether its condition had been changed to any extent, so far as being wet or dry or swampy or overflowed, by the general improvements of the county in any respect?

Well, I took particular notice of that, the improvements in Buena Vista county, more particularly, are scattered over the county; it is not yet enough to make a material change, more particularly in such land as this, that hardly could be swampy.

State if you could determine from the character of the land whether it ever had been, at or since the passage of the swamp-land act, September, 1850, swamp or overflowed land, and if you could determine, then say how you could determine, or how you did determine?

I did determine the difference of the good and swampy lands running it back to 1850 was this, I paid particular attention to the changes of locality, and to the changes of height or elevation in general; it is too high ever to be swampy at any season. Most of the land, I took a great deal of pains to learn it; 1850 was one of the dryest seasons we ever had in this country, in the west, that was a remarkable year, different from what all old settlers ever found it here.

What kind of a season was it when you surveyed this in 1877?

Well, I commenced June the eighth, and we had some of the severest storms I ever met, some of the houses were removed.

I mean so far as being wet?

Well, it was both wet and dry, it would come sometimes a terrible heavy wet, and then it would be dry the next day.

Well, in your judgment, state what you think in respect to this land that is described by you as dry and not subject to overflow as

being the same way in 1850, and state your reasons for your judgment.

Well, there might be perhaps some little difference, but I don't think there was. I don't see in this wild land how there could be a very great difference, more particularly when it would not
149 be under cultivation adjoining it. I think the land at present, or at the time I selected that, could not differ much from what it was in 1850, for there was no improvements so as to take the water or anything from it. There might, maybe the grass taken off, but I don't think there was any change.

State whether any of this land testified to by you to be dry was so situated as to be subject to overflow to such an extent as to injure the crops.

There is no land we selected that we thought could overflow so as to make it to be denominated overflow land. We guarded ourselves against it; when there was any doubt at all we turned it to the county.

Cross-examination:

When did you first visit the county of Buena Vista?

The first time I visited the county of Buena Vista was about the fifth or sixth of June, 1877.

When did you begin your survey of land in that county?

I think on the eighth of the same month.

When did you close?

Some time about the latter part of July; I was there about seven weeks; of course I don't count the Sundays.

Why did you not begin sooner?

Well, I had two reasons; I had one particularly; I could not say the reason I did not begin sooner than June, but there was one reason I had, that I could not begin in the winter, and I could not go to work satisfactorily, so as to be able to know the land.

Why did you not begin in the spring, so as to have the survey done at the time the court sat?

I could not answer that, sir, for I knew nothing of the court; I didn't know anything of the court being in session.

State whether you are the same Regan that made an affidavit in this case.

I am, sir.

Did you not say in that affidavit that the reason you did
150 not begin sooner was because the land was so wet in the spring of the year that you could not survey it?

I don't recollect about the spring of the year, but I know I made an affidavit as to the winter; perhaps I did; but if I spoke of the spring I don't know, but even if I would it would be with very good justice.

Is it a fact that up to the beginning of the June court of that year these lands were so wet you could not survey them?

I don't know anything about it, but what I could say about these rivers and streams was, that in a moderately wet season the water

90. 37.

Section 25. Ne ne thirty-two acres all good land, se se thirty-one acres all good land.

Section 13. Sw sw thirty-one acres good land, nw sw thirty-nine acres good land, nw ne thirty-four acres good land, ne ne thirty-two acres good land, se ne thirty-five acres good land, ne se thirty-five acres good land.

Section 7. Ne nw thirty-eight acres good land, nw nw all good land, nw sw all good land.

Section 5. Nw sw thirty-two acres good land.

90. 38.

Section 13. Se ne thirty-six acres good land.

Section 11. Ne se thirty-five acres of fine rolling land.

Section 15. Nw ne twenty-five acres good land, se nw thirty-five acres good land.

Section 7. Ne ne thirty-six acres good land, se ne thirty-eight acres good land.

Section 9. Se sw thirty-nine acres good land, sw sw thirty-six acres good land.

Section 15. Nw sw thirty acres good bottom land, the rest slough.

Section 21. Nw ne good land—thirty-eight acres in crops; sw nw thirty-six acres good farm land, se nw thirty-five acres good farm land, se ne all good and in crops.

Section 19. Nw se thirty-eight acres good land, sw se twenty-eight acres good land, se se twenty-eight acres good land.

Section 29. Sw se thirty-seven acres good land, se se thirty-six acres good land.

Section 25. Nw nw thirty acres good land, ne nw all good land, sw sw all good land, se sw thirty-six acres in crops.

154 90. 37.

Section 31. Se nw good land, part in crops.

Section 3. Sw sw twenty-six and twenty-five hundredths acres dry land, se ne two and six hundredths acres slough and thirty-seven acres good land.

91. 37.

Section 35. Se sw thirty acres good land, nw se thirty-four acres good land, ne ne thirty-three acres good land, se nw thirty acres fine low land, rather wet, but partly in crops.

90. 36.

Section 29. Sw nw twenty-two acres good land.

Section 19. Nw se thirty-four acres good land, sw ne thirty-two acres good land.

91. 37.

Section 33. Nw se twenty and three hundredths fair land for crops and the rest wet slough, ne ne twenty-five acres good land.

Section 27. Nw sw twenty-eight acres, ne sw thirty-six acres good land, sw ne thirty-four acres good land.

Section 25. Se nw twenty-one and three hundredths acres dry land that will do for crops, se ne thirty-six acres good land, ne se twenty-six acres all good land.

Section 23. Se sw thirty-five acres good land.

Section 21. Se se twenty-five acres good land.

Section 17. Se se twenty-three acres good land, sw se twenty-three acres good land, sw sw twenty-one acres good farm land, nw sw all good land and in crop.

Section 15. Sw nw twenty-two acres good land, nw ne thirty-six acres good land, ne ne thirty-five acres good land.

Section 11. Se sw twenty-two acres good dry land, ne sw twenty-six acres good land, ne se thirty-three acres good land, ne ne thirty-five acres good land.

Section 1. Se sw twenty-three acres good land, se se twenty-nine acres good land.

Section 3. Ne ne twenty-three acres good land, se ne twenty-six acres farm land, ne se twenty-nine acres good land, se se thirty acres good dry land.

155 92. 37.

Section 35. Nw nw thirty-two acres good land.

91. 36.

Section 17. Nw sw thirty-four acres good land.

Section 19. Se ne twenty-five acres good land, ne se thirty-five acres good land.

Section 31. Nw sw all good rolling land, sw sw forty-four and three-tenths acres good land, se se twenty-five acres good land, ne ne twenty-seven acres good land, nw nw all good land—all rolling good land; ne nw thirty acres good land.

Section 29. Nw sw is nice meadow land, ten acres of it is wet, the rest is dry meadow land; it would be thirty acres dry meadow land and ten acres not very wet.

Section 19. Nw nw twenty-eight acres good land.

Mr. KIDDER: State whether these lands or any of them—and, if so, which tracts—have been ditched or drained or protected by embankments to render them drier than they were in a state of nature.

I did not discover any embankments or any ditch on anything that I was on.

Was there any ditch or embankments on any of these tracts of land that would serve the purpose of draining the land?

Nothing more than was natural.

Were they, or were they not, all in a state of nature, except the plowing you mentioned on some?

Yes, except the improvements in plowing and crops. We commenced on the eighth day of June two years ago, and I quit on the twenty-seventh of June of the same year.

Cross-examination by Mr. PARSONS:

I reside at Storm Lake; the first time I ever saw the county of Buena Vista was seven years in September.

ROBERT CUMMINS, sworn for the defendant, testified as follows:

I am forty-nine years of age; live at Storm Lake, Buena Vista county, Iowa; by occupation a farmer. My experience in
156 knowing wet and dry lands is that I have been a farmer for twenty-two years; have broke up five farms in Iowa. I think I can tell from personal examination whether land is dry and fit for cultivation, or whether it is swampy and overflowed and wet and unfit for cultivation. My knowledge of the lands in controversy consists in going over them with Mr. Regan and helping him survey.

92. 36.

Section 31. Se se twenty-one acres dry land all fit for cultivation, sw nw twenty-three and ten hundredths good tillable land; quite dry; nw sw thirty-seven acres very good high, dry land.

Section 19. Sw sw twenty-one and sixty-two hundredths for cultivation, se se all dry land, nw se thirty-three and sixty hundredths first-class land, se ne thirty-five and eighty-five hundredths acres good dry land, nw ne quite rolling, all for cultivation.

Section 7. Se ne twenty-two and seventy-seven hundredths good dry land, sw nw thirty-three and fifty hundredths good farm land.

Section 27. Nw sw thirty-nine and ninety-five hundredths acres dry land.

Section 29. Sese thirty-four and thirty hundredths good dry land, se sw thirty-one and twenty hundredths acres good dry land.

92. 37.

Section 19. Se sw thirty-five and fifteen hundredths acres very good land for corn and wheat, nw sw thirty-eight and twenty hundredths acres good land, nw nw twenty-eight and seventy hundredths acres very good land, sw nw forty and three-tenths acres very good land.

Section 17. Sw sw thirty-five acres as good as in the county, nw sw thirty-six acres dry, rolling land, sw nw thirty-nine and five-tenths acres of the very best land, ne sw twenty-seven and thirteen hundredths acres very good land, se sw thirty-one and ten hundredths acres good land.

Section 21. Ne se twenty-nine and seventy-eight hundredths very good tillable land, se ne thirty-five and fifty-five hundredths acres good farm land.

157 92. 37.

Section 15. Sw sw twenty-nine and twenty-one hundredths acres good dry land and farm land, se sw twenty-two and eighty-seven hundredths acres good farm land, nw sw thirty-six and seven hundredths acres as good as in the county, ne se twenty-eight and twenty hundredths acres good land, sw nw twenty-seven and thirty-three hundredths acres good land—wheat land.

92. 37.

Section 7. Sw sw thirty-eight and thirty-three hundredths acres good dry land, nw nw thirty-four and forty-five hundredths acres

good farm land, ne sw all good dry land, se sw forty-four and sixty hundredths—forty-one and eighty-eight hundredths acres good dry land.

Section 9. Se nw thirty-eight acres good farm land, ne nw thirty-eight and sixty hundredths acres good land, ne ne twenty-seven and fifty hundredths acres good tillable land.

Section 31. Sw sw thirty-five and sixty-six hundredths acres good land.

Section 11. Se sw thirty-seven and thirty-six hundredths acres dry land, ne sw twenty-seven and sixty-seven hundredths acres, nw nw thirty and thirty-seven hundredths acres good wheat land.

Section 3. Ne se twenty-two and eighty-three hundredths acres good farm land, ne ne thirty and forty-five hundredths acres good land.

Section 1. Ne ne twenty-four and thirty hundredths acres good dry land, nw sw thirty-nine and sixty hundredths acres as good as in the county, se ne twenty-seven and forty hundredths acres good plow land.

93. 36.

Section 31. Se sw thirty-two and four-tenths acres very good dry land, nw sw thirty-two acres good land.

Section 19. Sw sw thirty-four and twenty-seven hundredths acres good land to farm.

158 Section 25. Se se thirty-six and five hundredths acres dry land.

Section 19. Nw se thirty-eight and fifteen hundredths acres good dry land.

93. 37.

Section 1. Se ne thirty-two and forty-three hundredths acres good dry land, sixteen acres of which is a high bluff; nw se twenty-two and seventy-five hundredths acres dry land.

Section 3. Sw nw twenty-three and five hundredths acres very good high dry land, ne se twenty-six and two hundredths acres high rolling land.

Section 5. Sw sw twenty-one and forty-six hundredths acres good dry land.

Section 35. Sw sw twenty-four and ninety-eight hundredths acres good farm land, balance good meadow; nw se thirty-seven and seventy-three hundredths acres dry land, se sw thirty-two and six hundredths acres good land, all dry.

93. 37.

Section 33. Se se twenty-four and twenty-two hundredths acres good wheat or corn land, ne se thirty and twenty-five hundredths acres dry land, good for corn or wheat; nw se thirty acres high dry land, ne sw twenty-nine and ninety-two hundredths acres dry land, nw sw twenty-nine and fourteen hundredths acres good wheat land, balance good meadow; sw sw thirty and eleven hundredths acres good land, balance meadow.

Section 29. Sw sw nineteen and fifty-nine hundredths acres sowed

in wheat, sixty-five hundredths in sod corn, total twenty and twenty-four hundredths acres good dry land.

Section 19. Nw nw twenty-six and fifty-six hundredths acres very high, dry land.

93. 38.

Section 11. Sw sw twenty-one and seventy-three hundredths acres first-class second bottom land, ne nw as good as in the county for farming, high and dry.

92. 38.

159 Section 13. Nw nw thirty-eight and seven hundredths acres good dry land, se se thirty-seven and eighty-hundredths acres good farm land, about twenty-five acres under the plow; sw ne thirty-eight and thirty hundredths acres too rough to raise good crops, nw sw all dry land and rolling, sw se thirty-four and ninety-five hundredths ares very high land, se sw thirty-three and ninety-two hundredths acres good farm land, sw sw twenty-three and twenty-four hundredths acres very high land, balance good meadow.

Section 15. Se sw twenty-seven and fifty-eight hundredths acres good land high and rolling, sw sw thirty-eight and sixty hundredths acres high, dry land.

Section 25. Ne se twenty-three and ninety-eight hundredths acres good dry land, nw ne twenty-nine and twenty hundredths acres good land.

Section 27. Ne ne thirty-four and sixty-seven hundredths acres dry land.

Section 33. Sw ne thirty-nine and seventy hundredths acres high and dry, good farm land.

Section 25. Se ne all good land, twenty in wheat and about thirty in wheat and corn.

Section 33. Se ne twenty-nine and sixty-eight hundredths acres good land.

91. 38.

Section 31. Ne se thirty-four and fifty-five hundredths acres dry land, nw se the best land all in wheat.

Section 5. Sw sw twenty-four and five hundredths acres very high, dry land, se se twenty-nine acres good farm land.

Section 17. Sw nw thirty-five acres dry land all fit for cultivation.

Section 27. Ne ne thirty-nine and seven hundredths acres all very high and dry, sw nw twenty and sixty-five hundredths acres all good for cultivation, nw sw all good farm land, se se thirty-eight and twenty hundredths acres all good dry land in wheat and oats.

Section 25. Ne ne thirty-nine acres high, dry land.

160 93. 37.

Section 7. Nw nw twenty-six and ninety-five hundredths acres good farm land.

Mr. KIDDER: You may state the facts with regard to drainage and embankment, and their effects upon these lands that you have testified about, if any.

The lands that I have sworn to as being dry do not need any artificial drain to make them dry; they have never had any artificial drainage; it has never been protected from overflow by embankments artificially made.

What do you say with respect to its condition on the twenty-eighth day of September, 1850, aside from the cultivation you have mentioned, as being wet or dry?

That is going back a good way in 1850.

State whether this land remains in the same condition, excepting the cultivation you have mentioned, that it was in on that day, September twenty-eight, 1850.

Well, there has been no change in it; can't be any more than the breaking of it up.

Cross-examination by Mr. PARSONS:

I first saw Buena Vista county seven years ago the fifteenth of May last.

ROBERT DELOSS, sworn on part of defendant, testified as follows:

Direct examination by Mr. KIDDER:

I reside at Storm Lake; by occupation a surveyor. I have surveyed lands to determine whether they were swamp, and was with Mr. Regan in the survey of these lands, I suppose, in question; I think I know swamp land if I see it. I can tell from personal inspection of a tract of land what its character is in respect to being swampy or overflowed or dry or fit for cultivation.

We commenced a survey of the lands in controversy June eighth, 1877, and made a survey of them with Mr. Regan, Mr. Petit, and Mr. Cummins; Petit was with us about half the time and
161 Cummins the last. I can, by the use of my book, state what lands were swampy and what were not; I could not state it from memory; I have two books that enable me to; and can state from memory with the aid of the memoranda taken by myself.

You may state fully the character of each tract of land by you examined as aforesaid, and the number of acres, if any, of land dry and fit for cultivation in each forty acres.

90. 36.

Section 17. Nw sw twenty-nine and twenty hundredths acres dry land fit for cultivation; quite rolling; sw nw twenty-five acres good grain land.

Section 19. Nw se twenty-four acres good, dry, rolling land, slopes to se sw ne thirty-two acres high, rolling land; se ne thirty-six acres high, rolling land, good grain land; ne ne thirty-six and twenty hundredths acres fine, rolling grain land.

Section 29. Sw nw twenty-two and one-tenth acres tillable land.

91. 36.

Section 17. Nw sw thirty-four acres good grain land.

Section 19. Se ne twenty-five and seventy hundredths acres very good grain land, dry, nice, and rolling; ne se thirty-five and fifty

hundredths acres very high, dry land and rolling; nw se thirty and eighty-five hundredths acres good, high, rolling grain land, nw nw twenty-seven and sixty hundredths acres high rolling corn land, very rolling and bluffy.

Section 29. Sw sw thirty and eighty-two hundredths good grain land, gently rolling, slopes to the southeast; nw nw thirty acres fine level farm land, not swampy now, and we have had very heavy rains; I think it a good, fair corn forty; sw nw thirty-one and seventy-four —— acres good corn land, very high on ne corner. The balance slopes lightly to south.

Section 31. Sw sw forty-four and thirty hundredths acres high, rolling land, some gravel mounds; nw sw forty-four and eighty hundredths acres by our wagon wheel measurement, high, rolling land, very fine grain land; se se twenty-five and forty-seven
162 hundredths acres good grain land, lies high and rolling; ne ne twenty-seven and forty hundredths acres good, dry land; nw nw every rod fair, dry land; ne nw ten acres fine level bottom, and thirty acres fine corn land as can be found.

92. 36.

Section 7. Sw ne thirty-three and fifty hundredths acres high, dry land; se ne twenty-two and fifty hundredths acres of land perfectly dry.

Section 19. Se se thirty-nine and sixty hundredths good, rolling grain land, dry and fit for cultivation; sw se twenty-one and sixty-two hundredths acres good, level land, no overflow, no swamp; nw se thirty-three and sixty-five hundredths high and rolling, inclined to be gravelly; sw ne thirty-five and eighty-five hundredths good, level land; se ne high, rolling prairie, fine grain land; nw ne high, rolling prairie, no sloughs or ponds.

Section 31. Se se twenty-one and seventeen hundredths acres level grain land, no slough; sw ne twenty-six acres good, dry, rolling farm land, all of which is in cultivation; nw sw, no swamp land on this forty, high and rolling the whole forty.

93. 36.

Section 19. Sw sw thirty-two and three hundredths acres very high, rolling land, too high to be good grain land; nw se thirty-seven and fifty-five hundredths acres high, rolling, dry land.

Section 31. Sw sw thirty-two and seventy-five hundredths acres good grain land, lies level, but perfectly dry; nw sw thirty and thirty-six hundredths acres fine level grain land, subject to cultivation any season of the year.

90. 37.

Section 3. Sw sw known as lot four Government survey, there is now twenty-six and twenty-five hundredths acres dry farm land. The original Government survey called for fifty-two acres on that tract, and described it as sw sw of that section all in the lake, no such quarter as sw sw. In the survey we ran down to lake—no such forty acres—the lot four is not full; se ne thirty-seven and forty hundredths acres good farm land.

163 Section 5. Nw sw thirty-two and twenty hundredths acres good grain land, now planted to corn; sw sw twelve acres now planted to corn, high and dry farm land, twenty-eight acres level meadow, not subject to overflow, fit for grass or grazing; four acres slough, twenty-eight acres could be cultivated in any ordinary season; sw sw twenty-three and fifty hundredths acres fine bottom meadow, rather low for corn, very fine meadow land, not subject to overflow, twenty-three and fifty hundredths acres could be cultivated any ordinary season.

Section 7. Ne nw thirty-eight and twenty-five hundredths acres good farm land, not wet or sloughy; nw nw good farm land, forty acres; nw sw good farm land, every foot of it.

Section 9. Sw sw known as lot two Government survey, according to Government survey twenty-two and fifty-hundredths acres, and is seventeen and forty-seven hundredths acres good, high, rolling farm land; nw sw known as lot one Government survey, eighteen and twenty hundredths acres according to the Government survey; there is eighteen and thirty hundredths acres of good farm land.

Section 11. Known as lot four Government survey thirty-two and eighty hundredths acres, in the tract of which we found nineteen and eighty-nine hundredths acres good farming land, dry; it is a fractional forty lying on the lake.

Section 13. Sw sw about thirty-one and seven-tenths rolling grain land; nw sw thirty-nine and three-tenths acres fine dry farm land; nw ne thirty-four and twenty-three hundredths acres grain land, dry; ne ne thirty-two and seventy-eight hundredths acres good dry farm land, level.

Section 25. Ne ne thirty-two and fifty hundredths acres dry arable land, not subject to overflow; se se twenty-one acres good farm land, high and dry all seasons of the year, the northeast portion of the forty slopes gently to the south.

Section 31. Se nw all broke, about one-half is sown to wheat, all rolling dry farm land.

91. 37.

164 Section 1. Se sw twenty-four and nineteen hundredths acres high rolling corn land, perfectly dry and high; se se twenty-nine and thirty-one hundredths acres good dry grain land.

Section 3. Ne ne twenty-three and fifty-eight hundredths acres high rolling prairie, slopes rapidly to the west; se ne twenty-six and forty-three hundredths acres high, dry land; ne se twenty-nine and seventy-eight hundredths acres good dry grain land, very high and rolling, a rough forty; se se thirty and fifty-seven hundredths acres very high rolling land, with some gravel in the land.

Section 11. Se sw twenty-two and seventy-four hundredths acres level farm land, all good grain land; ne sw twenty-six and forty-three hundredths acres good grain land; ne ne thirty-three and forty hundredths acres good rolling corn land; ne se thirty-five and forty hundredths acres good grain land, all high and rolling.

Section 13. Se se thirty-five and twenty-five hundredths acres

high rolling prairie for cultivation; sw sw thirty-eight and twenty hundredths acres high rolling corn land, dry.; ne ne thirty-seven and five hundredths acres very good corn land, lies high and rolling.

Section 15. Sw nw twenty-two acres very good dry land, good for cultivation; nw ne thirty-six and two tenths acres good grain land, about thirty acres broke and under cultivation with crop of wheat; ne ne thirty-five and thirty hundredths acres fine rolling land, good grain land.

Section 17. Se se about twenty-three and twenty-nine hundredths acres good grain land; sw se twenty-three and eighty-eight hundredths acres good grain land, slopes gently to north, not subject to overflow; sw sw twenty-one and ninety-two hundredths acres good grain land, fifteen acres broke, all high and dry; nw sw thirty-eight and fifty hundredths acres good grain land, under cultivation, planted to corn, high and dry, and good for cultivation.

Section 21. Se se twenty-five acres dry grain land, all high and rolling.

165 Section 23. Se sw thirty-five and thirty hundredths acres good grain land.

Section 25. Se ne thirty-six and three-tenths acres good grain land, fine rolling prairie; se nw twenty-one and eighty-seven hundredths acres good corn land, lies level on the bottom, balance meadow; ne se twenty-seven acres good grain land, high and dry; sw se thirty-seven and thirty hundredths acres good dry land and rolling, a good forty.

Section 27. Nw sw twenty-eight and seven-tenths acres good dry farm land; ne sw thirty-six and eighty hundredths acres grain land, about thirty-three broken, part planted to corn and part wheat; sw ne thirty-four and seventy-five hundredths acres in oats, good grain land, some gravel, land is all dry.

Section 33. Nw se twenty and twenty-one hundredths acres good dry land, slopes gently to the center of the forty; ne ne twenty-five and thirty-nine hundredths acres good level land, has been broken, but not planted.

Section 35. Se sw thirty acres good grain land; sw se thirty-three and thirteen hundredths acres good, dry, rolling, farm land; se se thirty-four and ninety-five hundredths acres good grain land; ne se thirty and eighty-seven hundredths acres good farming land, dry and rolling.

Section 35. Se nw thirty acres good dry grain land broken and sown to wheat; nw ne thirty-two and three-tenths good farm land, and rolling; ne ne thirty-three and one-tenth good grain land, dry and rolling.

92. 37.

Section 1. Ne ne twenty-four and thirty hundredths acres high and dry land, with a large pond on the west side; nw sw thirty-nine and sixty hundredths acres very high and dry rolling land, some gravel mounds; se ne twenty-seven and forty hundredths acres gently rolling, good dry land.

Section 3. Sw sw thirty-five and sixty hundredths acres level corn land, not wet or sloughy, rich bottom land, good corn land; ne se twenty-two and eighty-three hundredths acres gently rolling
166 grain land, dry and good for cultivation; ne ne thirty and forty-five hundredths acres very high, with some gravel knolls.

Section 7. Sw sw about thirty-five acres broke and planted to corn and sown to oats, twenty-five broken and sown to crops, balance broken, not sown; it is not swampy; the thirty-five acres is high; sw sw about twenty-five acres broke and planted; Government survey gives forty-four and sixty hundredths acres; there is forty and ninety hundredths acres, and this tract is number one land, dry; se sw thirty-seven and thirty hundredths acres good rolling land; ne sw thirty-seven and thirty hundredths acres good rolling land.

Section 9. Nw nw thirty-four and forty-five hundredths acres good rolling grain land, dry; se ne thirty-eight acres rolling grain land, with some gravel knolls, dry; ne nw thirty-eight and sixty hundredths acres high rolling prairie, good grain land, all dry; ne ne twenty-seven and fifty hundredths acres level land, not swampy or sloughy.

Section 11. Se sw thirty-seven and sixty hundredths acres high, level, dry, corn land; ne sw twenty-seven and fifty-one hundredths acres very high, rolling, dry, corn land; nw nw thirty and fifty hundredths acres very high, rolling, corn land with considerable gravel.

Section 15. Sw sw twenty-nine and thirty-five hundredths acres high, rolling, grain land; se sw twenty-two and ninety hundredths acres level farm land for cultivation, dry, too level; nw sw thirty-six and seventy hundredths acres high, rolling, corn land for cultivation, dry; ne sw thirty-eight acres very high rolling prairie, good grain land, little inclined to be gravelly; sw nw twenty-seven and twenty hundredths acres, I think, high, rolling, grain land, some gravel, quite dry; ne se thirty-six acres good grain land, gently rolling and very dry.

Section 17. Thirty-five acres good rolling prairie, good corn land; nw sw thirty-six acres very high rolling land, too rolling for good corn land; sw nw thirty-nine and five hundredths acres good corn land, high, dry, and very rolling; ne sw twenty-seven
167 and thirty hundredths acres very high, rolling, grain land; se sw thirty-one and one-tenth acres very high and rolling land.

Section 19. Se sw about thirty-five and thirty hundredths acres good grain land; nw sw Government survey gives forty-four and one-half acres; it has thirty-eight and thirty-five hundredths acres very high, rolling prairie; nw nw, this forty contains forty-four and three-fourths acres according to Government survey; there is twenty-eight and seventy-one hundredths acres rolling and dry corn land; sw nw forty and thirty hundredths acres good grain land; Government survey gives forty-four and thirty hundredth acres; the balance, four acres, grass meadow.

Section 21. Ne se thirty-one and twenty hundredths acres high, rolling prairie, all good for cultivation; se ne thirty-four and fifty-two hundredths acres level farm land, not subject to any overflow; it is not swampy, it is level, dry grain land, not swampy; balance slough meadow, big slough grass.

Section 27. Ne ne thirty-three and sixty hundredths good, rolling prairie, no wet or swamp; nw sw thirty-nine and ninety-five hundredths acres very high and rolling grain land.

Section 29. Se se thirty-four and thirty-one hundredths good grain land, all of which is very high; se sw thirty-one and twenty-one hundredths acres good, high grain land.

Section 35. Nw nw thirty-two and ten hundredths good, dry grain land.

93. 37.

Section 1. Nw se twenty-two and seventy-five hundredths very high and bluffy, dry land, lies right up on a bluff; se ne twenty-seven and forty hundredths acres good grain land, balance good meadow.

Section 13. Nw nw about thirty-nine acres very high and bluffy land.

Section 25. Se se thirty-six and five hundredths gently rolling corn land, not wet; se ne thirty-three and thirty-four hundredths good grain land, lies very high and quite rolling.

90. 38.

Section 7. Ne ne thirty-six acres good grain land, all in
168 crops, part wheat and part corn; se ne thirty-eight acres of good grain land, partly sown to wheat, being high and dry at all seasons.

Section 9. Sw sw forty acres grain land, and all sowed to wheat and planted to corn.

Section 11. Ne se thirty-five and fifty hundredths high and very rolling land, rather inclined to be hilly

Section 13. Se ne thirty-six and seven hundredths good farm land, and three and three hundredths slough.

Section 15. Nw ne twenty-five and eight hundredths acres good grain land, all sown to wheat now, or was two years ago; se nw thirty-five and fifty-one hundredths good farm land; no better in Buena Vista county; nw sw thirty acres fine, level land, and ten acres low meadow.

Section 19. Nw ne, this forty has thirty-eight and six hundredths acres high, rolling grain land, as good as any in Iowa; sw ne twenty-eight ninety-five hundredths good, high rolling land, slopes to south; se ne twenty-eight acres high and very rolling, good grain land.

Section 21. Nw ne thirty-eight and eighty hundredths acres under cultivation; sw nw, this forty has thirty-six and ninety hundredths acres, all good corn land.

Section 21. Se nw thirty-five and fifty-eight hundredths acres good grain land se ne, this forty is all sown to oats and planted to corn, every foot of it; it is No. 1, good land; it is dry.

Section 25. Nw nw thirty and forty hundredths good grain land,

level, but not wet; ne nw all good land, dry, has in a crop of wheat; it has a small run across the northwest corner about four feet wide; sw — all good farm land and under cultivation, level; se sw thirty-six acres under cultivation, planted to corn, about four acres in a sag, thirty-six all under cultivation, and dry.

Section 29. Sw se thirty-seven and four-tenths of high rolling grain land; se se thirty-six and three tenths acres good grain land, high and rolling, dry.

93. 37.

Section 3. Sw nw twenty-three and five-tenths acres very
169 high and bluffy, about thirty feet higher than the river; it lies right up on a steep bluff; ne se twenty-six and fifty hundredths acres very high and bluffy, the balance bottom.

Section 5. Sw sw twenty-one and forty-six hundredths acres good high grain land, in cultivation, planted to corn.

Section 7. Nw nw twenty-six and ninety-five hundredths acres very rolling grain land, dry, a little inclined to be bluffy.

Section 29. Sw sw nineteen and eighty-nine hundredths acres level grain land, eighteen and eighty-nine hundredths acres now sown to wheat; Government survey calls for thirty-nine and sixty-four hundredths acres in the forty; nw nw twenty-two acres very high, rolling grain land.

Section 19. Nw nw twenty-six and fifty-six hundredths acres very high and rough; could not farm over eight acres, being too rough.

Section 33. Se se twenty-four and twenty-two hundredths acres level farm land for cultivation; the land is high, but level; ne se thirty-one and seventy-two hundredths acres good farm land, all of which is subject to cultivation; nw se thirty and forty hundredths acres level grain land, dry, and not subject to overflow; ne sw twenty-nine and ninety-two hundredths acres good level land, not swampy or sloughy; nw sw twenty-nine and fourteen hundredths acres level land, very good corn land, not swampy or sloughy; sw sw thirty and eleven hundredths acres good grain land, dry, and not subject to any overflow.

Section 35. Sw sw thirty-four and ninety-eight hundredths acres level land, good, fair grain land; nw se thirty-seven and seventy-three hundredths acres, land not swampy, but level, dry, level land; se sw thirty-two and sixty hundredths acres, not swampy, but level.

91. 38.

Section 5. Sw sw twenty-four and five hundredths acres very high, rolling farm land, not subject to overflow; se se twenty-eight and fifty hundredths acres very high grain land, about twenty acres now sown to wheat.

170 Section 17. Sw nw thirty-four and eighty-five hundredths — gently rolling corn land, all which is fit for cultivation.

Section 25. Ne se twenty-four and twenty hundredths very fine rolling grain land, dry and good for cultivation; ne ne, all of this forty except twenty-one hundredths acres under cultivation, very fine land, and planted to corn.

Section 27. Ne ne thirty-nine and seventy hundredths acres high, rolling prairie, all dry, and good for cultivation; se se has about thirty acres sown to wheat and oats and planted to corn, balance broke; there is about three and eight hundredths acres of it good, tillable land, one of the best pieces of land in the county, right west of Alta; sw nw twenty and thirty-three hundredths acres level, dry land; balance is dry blue-grass meadow; nw sw, every foot of it is fine corn land, high and dry.

Section 31. Ne se thirty-five and fifty-five hundredths acres high, rolling land for cultivation; nw se all sown to wheat; it is very high and rolling.

92. 38.

Section 13. Nw ne thirty-eight and fourteen hundredths acres very high and dry prairie, rather high for corn land; sw ne thirty-seven and ninety-six hundredths acres very high and rolling, rather high for good corn land; se ne has twenty-five acres under cultivation, part planted to corn and part sown to wheat; there is thirty-seven acres good corn land on the forty, not swampy nor overflowed; nw se very high and rolling, and too high for good farm land; sw se thirty-five and fifty-three hundredths acres very high and rolling, rather too high for good grain land; se sw thirty-three and eighty-five hundredths acres very high and rough, high and rolling, bluffy, not swampy land by a good deal; sw sw twenty-three and thirty-six hundredths acres very high and bluffy land; never was swampy.

Section 15. Se sw twenty-seven and fifty-six hundredths acres very rolling grain land, dry, and good for cultivation; sw sw thirty-eight and sixty-seven hundredths acres high, rolling grain land, dry, and good for cultivation.

Section 25. Nw ne twenty-eight and seventy-one hun-
171 dredths acres dry, rolling grain land, the whole of which can be farmed.

Section 27. Ne ne thirty-two and fifty-nine hundredths acres very fine high rolling grain land and dry.

Section 33. Se ne has about twenty-three and sixty-two hundredths acres good dry land, good for cultivation; sw ne thirty-nine and seventy hundredths acres good rolling prairie, dry and good for cultivation.

Section 35. Se ne has about thirty acres under cultivation, about twenty acres sown to wheat, not one foot of it but what is the best of grain land.

93. 38.

Section 11. Sw sw twenty-one and sixty-eight hundredths acres fine bottom land not subject to overflow; ne se all number one grain land, no slough or wet land.

Section 25. Se se twenty-three and ninety-seven hundredths acres very high and rolling land, inclined to be bluffy.

Mr. KIDDER: State whether or not any of this land has been drained or protected from overflow by embankments.

I saw no embankments from the examination I made.

Has any of this land been improved or made drier by artificial means; and, if so, by what?

There has no artificial means ever been taken, except breaking and improving the land, and putting it into crops.

How is the present condition of this land that you have specified as under cultivation, as compared with its condition on the twenty-eighth day of December, 1850?

I didn't see it in 1850, but I saw no reason or causes that would make any difference or any change in the land.

How long have you resided in Buena Vista county?

Nine years.

Have you had knowledge in that time of the general character of the country in that county during that time, and of the land?

I had considerable knowledge of Buena Vista county during that time.

State whether since that time there has been any change—
172 and, if so, what—in the character of this land, in respect to its being dry.

I have not discovered any change; I have been over the county a good deal, sir, and I didn't see any change at all, sir.

Now, in giving the numbers of acres in each tract you have described, do you mean to say that the remainder of each of these tracts is subject to overflow?

No, sir.

What are the facts about that?

Well, the facts are these, that on a great many of the forties there would be a tract of perhaps five or ten acres, perhaps a little more, that would be level and good meadow land, but land that I didn't really consider good grain land, and it was not really tillable; then, again, there were some ponds.

What would you say regarding such lands, with respect to being subject to overflow?

With the exceptions of along the Little Sioux river, very little, there might, perhaps, have been at the outlet of Storm lake; there is no overflow of any kind, except along the Little Sioux bottom, and perhaps along the outlet of the lake; aside from that there is no overflow in the county; there may be a little overflow on the Maple, but it would have to be very high for it to get out of its banks.

COURT: One tract, sw of nw 19, 92, 37, no one has testified to except Mr. Deloss.

Mr. COOK: That, I guess, we don't claim, do we?

Mr. KIDDER: I can't tell from this list.

Mr. KIDDER: Mr. Deloss, how do you determine that none of this land you testified to was subject to overflow?

Well, from the position the lands lay in, and also from the appearance of the grass. All overflowed lands will show on the surface; the grass will show the condition.

How did you determine that along the Little Sioux river?

Well, we could see as a general thing; a man could see the

water lines along the edge of the bank about how high it came on the banks and trees; you could see little bunches of grass
173 along in the willows and could tell about how high it came up; also you would see the water lines along in the edges of the grass along the side of the bank.

The deposition of Mr. J. Van Deventer was here read in evidence by the defendant. Hereinbefore printed, beginning upon page thirty-five, and extending to page thirty-eight.

WILLIAM COOK, sworn on part of the defendant, testified as follows:

I am defendant's agent for the payment of taxes; have been since 1871; I have a statement or schedule of the lands involved in this suit on which I have paid taxes, and the date of payment and the amount paid, and a particular list is attached to the supplemental answer in the case; I have paid the taxes stated in that schedule; I am informed by the officers of the county that the tax-books prior to 1876 were burned at the time of the burning of the court-house, January first, 1876—I guess it was two years ago, 1877; these lands were assessed upon treasurer's books to the Iowa Falls & Sioux City Railroad Company; I have the tax receipts for the taxes I paid; I here produce them (they were read in evidence); where the tax receipts show payment of a whole section or on part of a section, including one of the forties in dispute, the section would be assessed at so much, for instance, so much per acre, the amount upon the full section so many dollars valuation. In making up this statement, the proportion, say one forty, or three forties, the taxes would be due on that amount at the valuation of the whole section; that is the basis of my calculation. Where that shows a whole section or part of a section, the valuation was the same. Suppose there was a whole section that was assessed at so much an acre, and amounted in the aggregate to so much per section. On the tax-books there was no subdivision of it; it was assessed as an entire section, or where there was a quarter section it was assessed as a quarter section at so much. Probably in that quarter section there would be only one forty in controversy. So in making out the amount of taxes
174 on those particular lands in this suit, I had to make it out according to the valuation of the whole; I had to apportion it according to the valuation and taxes on the whole section. Consequently it would be difficult to introduce these receipts as an entirety and make them intelligible.

An abstract of one of the tax receipts is hereinafter printed as Defendant's Schedule "A." In the form there shown, these receipts include payments of all the taxes stated in defendant's schedule of taxes paid.

All of the foregoing evidence was objected to by counsel for plaintiff, upon the ground that it was incompetent; that the payments claimed to have been so made constitute no ground of counter-claim herein, and that the defendant was estopped by the judgment upon the demurrer to the second division of its answer.

The defendant gave no other or further evidence, and the plaintiff thereupon gave evidence as follows:

I. An extract from a message of Ralph P. Lowe, Governor of Iowa, to the General Assembly, January ninth, 1860, as follows:

"The four land-grant railroads in this State claim the right to impeach the swamp-land selections, so far as they conflict with their grant, notwithstanding near three years ago these selections, whether their real character was swamp or dry, were, by a special act of Congress, confirmed to the State. This right upon application was conceded to these companies by the Commissioner of the General Land Office, with the consent of the Secretary of the Interior, without giving the State hearing upon the question. Hence the swamp-land selections, found upon odd sections, falling within the description and limits of the railroad, being fifteen miles on either side of each line, have not been, with other swamp lands, certified to the State. On being informed of these facts, I proceeded to Washington and made an urgent, personal appeal to the Secretary of the Interior, for a reversal of this decision, for reasons which were named, but he declined to do so, yet expressed a willing-
175 ness to require the railroad companies to designate at once the tracts claimed to be dry, and to submit proof that should at least be equivalent to the evidence furnished that they are swamp lands, otherwise they should be certified to the State, and to this effect did he so instruct the commissioner. Still I have heard of no such designation; the lands still remain uncertified to the State. I have been unable to learn from the commissioner what course he designs to pursue in reference to the instructions of the Secretary of the Interior; and the question recurs: Where is this matter to end? If the contest goes on, it must necessarily be protracted and expensive to the people of the counties, whilst it will prove in the end detrimental to the railroad companies themselves. It is obviously their interest to propitiate the favor, rather than the hostility, of the people, in pushing forward their several enterprises. The counties deeply feel the want of railroads, and many of them would be willing to give or subscribe their swamp lands to attain so desirable an object; but they are not thus willing to be deprived of them without their consent, or subjected to the other alternative of proving them up a second time at great cost and trouble. The railroad grants were made to the State in trust for certain railroad companies. The State, as I read the act, has already made a declaration of this trust in favor of the companies in question, subject, however, to the conditions and restrictions contained in the act of Congress granting them. One of these conditions is that the land shall only be sold as the construction of the roads progresses—that is, after one hundred and twenty sections have been sold; another like quantity shall not be sold until the Governor of the State shall certify to the Secretary of the Interior that twenty continuous miles of any of said roads have been completed. Now, in order to put an end to this unhappy controversy, which has been the source of so much complaint in the State, I cannot but feel that

it is my duty to recommend the adoption of a joint resolution by your bodies instructing the Governor to sign no more certificates of the description spoken of to any of said companies until they shall file in his office a written relinquishment of their supposed
176 right to contest the swamp land selections that may fall within the limits of their grants, and a consent on their part that the Commissioner of the General Land Office may proceed to patent them to the State as other swamp land." * * *

RALPH P. LOWE, *Governor.*

II. An act of the General Assembly, as follows:

An act to require the Dubuque & Sioux City Railroad Company to release certain swamp, school, and river lands on the line of said road, and providing for the compensation therefor by an extension of the time of building said road.

SECTION 1. Be it enacted by the General Assembly of the State of Iowa, That from and after the taking effect of this act the Governor of the State of Iowa shall not certify to the Secretary of the Interior that any part of the road is completed on the line of the Dubuque & Sioux City railroad, as now provided for by section four of the act of Congress making said grant, approved May fifteenth, A. D. 1856; nor shall said road be entitled to receive any certificate for lands on said line of road until said company shall have executed a deed of release of all the swamp and overflowed lands now approved or that may be hereafter approved by the surveyor general, in any county within the fifteen-mile limits of said road, to the county in which such swamp and overflowed lands may be situated, including all such swamp or overflowed lands as were returned and certified to the General Land Office and ratified to the State by act of Congress of March third, 1857. * * *

Approved April seventh, 1862.

III. A joint resolution, as follows:

Be it resolved by the General Assembly of the State of Iowa, That whereas the Commissioner of the General Land Office of the United States has rejected certain lists of lands selected as swamp and overflowed lands within this State by the agents of the State, under the act of Congress approved September twenty-eighth, 1850, under the supposition that the State of Iowa claims said lands for railroad purposes, under the act of May fifteenth, 1856; and whereas many of the lands so rejected have been sold to *bona fide* purchasers by authority of the General Assembly of this State, and are now in actual possession and cultivation by citizens of this State; therefore, resolved, That the State of Iowa hereby disclaims any purpose or intention to claim the lands so selected as swamp and overflowed lands, under any other grant or for any other purpose than is expressed in the act of Congress approved September twenty-eighth, 1850. Resolved, That any selection of any
177 of the swamp and overflowed lands of this State for railroad purposes, or the selection for railroad purposes of the lands

selected as swamp and overflowed lands, by the agents of this State prior to March third, 1857, has been without authority or consent of the State of Iowa, and any and all such supposed acts upon the part of the State of Iowa are hereby expressly disclaimed. Resolved, That the secretary of State be requested to furnish a copy of these resolutions, duly attested under the seal of the State, to the Commissioner of the General Land Office and the Secretary of the Interior of the United States; and the Governor of this State be authorized to take such steps as shall secure to this State the swamp and overflowed lands, under the acts of Congress approved September twenty-eighth, 1850; March third, 1857, and March twelfth, 1860.

Approved April seventh, 1862.

IV. A joint resolution, as follows:

Joint resolution of the twelfth General Assembly relating to swamp land selections made by the agents of the State during the years 1859, 1860, and 1861.

Whereas the swamp land selections made by the agents of the State of Iowa in 1859, 1860, and 1861 in the counties of Emmett, Buena Vista, and ten townships in Dickinson were made in due time and duly forwarded to the office of the surveyor general of Iowa, but were not promptly filed in the Department at Washington by the surveyor general; and whereas by the present ruling of the Department said returns cannot now be made without a special act of Congress authorizing their reception by the Department; therefore,

Resolved by the House of Representatives, the Senate concurring, That our Senators in Congress be instructed, and our Representatives be requested, to use their best efforts to procure the passage of an act directing the Department to receive and pass upon said returns in the same manner as if they had been filed in due time.

Resolved, That the Secretary of State be directed to forward a copy of this resolution to each of our Senators and Representatives.

Approved March twenty-first, 1868.

V. The demurrer of plaintiff to the second division of defendant's answer and the decision of the court thereupon and the affirmance thereof by the supreme court, all of which are printed *supra*, pages six to ten.

VI. SAMUEL MERRILL, sworn as a witness upon the part of the plaintiff, testified as follows:

I was Governor of Iowa in 1871, and as such signed the
178 patents shown me. In regard to patenting the lands in question to the Iowa Falls & Sioux City Company, I used to make inquiry as to the rights of the parties to the lands that the Government had given or set aside for railroad purposes, but as to the character of the lands, whether they were swampy or otherwise, I never undertook to investigate.

Cross-examination:

The fact that these lands had been certified to the State by the

Secretary of the Interior of the General Government as due to the railroad companies when they had earned them was all I needed to inquire into, and then to see whether they were entitled to them. I did not need to investigate the quality of the soil. I might answer that I did not know that they had been selected as swamp lands; had I known that I should probably have felt that there would have been a defect in the title. I supposed the selection was all straight and the only question was whether the companies had earned them under the law.

VII. H. L. SKINNER, sworn upon the part of the plaintiff, who testified as follows:

I am agent of the American Emigrant Company and reside at Des Moines; my business has been such through the past twelve years that I have become familiar with the interior portions of the State, where the American Emigrant Company has its interests. By frequent observations I have noticed that a very material change in the swampy and wet character of the lands has taken place. Ponds and sloughs have materially diminished in extent during this period by reason, in my judgment, of the breaking of the sod, turning over the lands, etc., for the purpose of agriculture, causing greater evaporation and absorption, preventing the draining into the sloughs of the quantity of water seeking there before that soddy surface was broken. I have noticed that particularly where the American Emigrant Company has its interests; I know many instances in various portions of the State where regions before swampy and where there were ponds that have become actually dry.
179 This has a large effect upon the land extending back various distances, according to the peculiar surface of the country. If the land rises back, its extent is not as far; if ordinarily level, the effect reaches out to a considerable extent on all sides of the pond. I know many instances where parties have broken land down as near to the water's surface as they possibly could in seasons ordinarily dry, which have been largely drained, because of the improvements or cultivation.

It is here admitted by the defendant that James C. Savery, a witness upon the part of the plaintiff, now absent, would, if present, swear substantially as the witness, H. L. Skinner, who has just left the stand; and it is agreed that this admission may stand in the place of his testimony, subject to the same objections as to the witness Skinner, the same as if the said Savery were present and so testified.

Mr. KIDDER: We make the formal motion to strike out the testimony of H. L. Skinner and Jas. C. Savery as being immaterial, irrelevant, and incompetent.

Reserved by the court for consideration with all other objections. Upon the final consideration of the cause the court overruled the objection and held the evidence competent.

No other or further evidence having been given by either party,

and the oral evidence having been taken in short-hand by C. A. Mosier, reporter for that purpose, duly appointed by the court, and by him filed and transcribed as the same, is hereinbefore set forth, and all the documentary evidence having been duly filed by the parties, the court thereupon adjudged and decreed as follows:

THE COUNTY OF BUENA VISTA, IN THE STATE OF IOWA,
vs.
THE IOWA FALLS & SIOUX CITY RAILROAD COMPANY. } Decree.

Now, on this fourth day of December, A D. 1879, it being the eighth day of said term, this cause coming on for final hearing, upon the evidence submitted, and after arguments by the attorneys for the respective parties, Galusha Parsons, for the plaintiff, and E. S. Bailey, I. N. Kidder, and G. S. Robinson, for defendant and petitioner, the cause having been fully submitted to the court, and the court being fully advised in the premises, finds and adjudges that the judgment and decree heretofore, to wit, on the sixth day of June, A. D. 1877, rendered in this cause by this court, was erroneous, and should be modified, vacated, and set aside as hereinafter directed; that plaintiff is entitled to recover of defendant, after the repayment of the taxes heretofore paid thereon, with interest from the date of such payment of taxes, at six per cent. per annum, amounting to the sum of four thousand one hundred and eighty-six dollars and seventy-one cents, the lands hereinafter particularly designated; that defendant is entitled to recover of plaintiff the aforesaid sum for taxes erroneously paid on said lands last mentioned, together amounting to the sum last above named; that defendant has heretofore sold or otherwise disposed of lands the title of which was rightfully in plaintiff, and described as follows: Lot No. 3, in sec. 11, twp. 90, range 37; se sw of sec. 17, twp. 91, range 37; nw se of sec. 33, twp. 91, range 37; ne se of sec. 33, twp. 91, range 37; ne se of sec. 1, twp. 93, range 37; sw sw of sec. 5, twp. 93, range 37; nw sw of sec. 29, twp. 93, range 37; sw sw of sec. 5, twp. 91, range 38; sw nw of sec. 27, twp. 91, range 38; and the se se of sec. 11, twp. 93, range 38; and the plaintiff is entitled to judgment for the prices for which said lands were sold, with interest thereon at six per cent. from the date of such sales, amounting in the aggregate to the sum of thirty-four hundred and sixty-two dollars and twenty cents, and that the title to said lands should now be confirmed in the defendant and its assigns. Therefore it is considered, adjudged, and decreed by the court that the judgment and decree heretofore, to wit, on the sixth day of June, A. D. 1877, by this court in this cause made, be, and the same is hereby, set aside, vacated, and declared to be null and void, and of no effect, except as to the lands hereinafter awarded to the plaintiff, and that as to said lands the same be affirmed as herein modified; that de-
181 fendant have and recover of the plaintiff the sum of seven hundred and four and fifty-one hundredths dollars, the same being the amount due on account of taxes erroneously paid as aforesaid in excess of the amount due plaintiff for lands of plaintiff sold by defendant; and it is further ordered that on the payment of

said sum of seven hundred and four and fifty-one hundredths dollars the plaintiff have and recover of and from the defendant the lands situated in the county of Buena Vista, State of Iowa, and described as follows:

Part of Section.	Section.	Town.	Range.
Se ne	3	90	36
Sw ne	"	"	"
Ne nw	"	"	"
Nw nw	"	"	"
Se nw	5	"	"
Sw nw	"	"	"
Se sw	"	"	"
Ne nw	9	"	"
Se nw	"	"	"
Nw sw	"	"	"
Ne sw	"	"	"
Se sw	"	"	"
Nw se	"	"	"
Sw ne	11	"	"
Ne ne	"	"	"
Se nw	15	"	"
Sw sw	"	"	"
Ne nw	17	"	"
Nw nw	"	"	"
Sw se	19	"	"
Ne ne	21	"	"
Sw ne	"	"	"
Ne nw	"	"	"
Nw nw	"	"	"
Sw nw	"	"	"
Se nw	"	"	"
Sw sw	"	"	"
Ne se	21	"	"
Se se	"	"	"
Ne nw	23	"	"
Ne sw	"	"	"
Nw sw	"	"	"
Sw sw	"	"	"
Se sw	"	"	"
Ne nw	27	"	"
Nw nw	"	"	"
Nw sw	"	"	"
Nw ne	29	"	"
Nw sw	"	"	"
Sw sw	"	"	"
Ne nw	"	"	"
Nw nw	"	"	"
Se nw	"	"	"
Sw se	"	"	"
Ne se	"	"	"
Se se	"	"	"
Se nw	33	"	"
Sw nw	"	"	"
Se se	"	"	"
Nw nw	35	"	"
Sw nw	"	"	"
Nw sw	"	"	"
Sw sw	"	"	"
Ne nw	1	91	"
Se ne	3	"	"

Part of Section.	Section.	Town.	Range.
Sw ne	3	91	36
Ne ne	"	"	"
Nw nw	"	"	"
Ne se	"	"	"
Nw se	"	"	"
Se se	"	"	"
Ne ne	5	"	"
Nw ne	"	"	"
Sw ne	"	"	"
Se ne	"	"	"
Nw nw	"	"	"
Ne sw	"	"	"
Se sw	"	"	"
Nw se	"	"	"
Sw se	"	"	"
Sw sw	7	"	"
Ne se	"	"	"
Se nw	9	"	"
Nw nw	"	"	"
Sw nw	"	"	"
Se sw	"	"	"
Sw sw	"	"	"
Sw sw	11	"	"
Ne se	"	"	"
Nw se	"	"	"
182 Se se	"	"	"
Se nw	13	"	"
Ne sw	"	"	"
Nw sw	"	"	"
Sw sw	"	"	"
Se sw	"	"	"
Nw se	"	"	"
Sw se	"	"	"
Ne se	"	"	"
Ne ne	17	"	"
Nw ne	"	"	"
Sw ne	"	"	"
Se ne	"	"	"
Se nw	"	"	"
Sw nw	"	"	"
Ne sw	"	"	"
Ne se	"	"	"
Nw se	"	"	"
Se se	"	"	"
Sw sw	19	"	"
Ne ne	21	"	"
Sw nw	"	"	"
Nw sw	"	"	"
Nw ne	25	"	"
Sw ne	"	"	"
Ne se	"	"	"
Nw se	"	"	"
Sw se	"	"	"
Se se	"	"	"
Sw ne	27	"	"

Part of Section.	Section.	Town.	Range.
Ne se	27	91	36
Nw se	"	"	"
Ne ne	29	"	"
Se sw	"	"	"
Ne sw	"	"	"
Ne se	"	"	"
Se se	"	"	"
Nw nw	33	"	"
Sw nw	"	"	"
Ne nw	35	"	"
Nw nw	"	"	"
Sw nw	"	"	"
Se sw	"	"	"
Sw sw	"	"	"
Ne ne	1	92	"
Se ne	"	"	"
Se se	"	"	"
Ne ne	3	"	"
Se ne	"	"	"
Nw nw	"	"	"
Ne sw	"	"	"
Nw sw	"	"	"
Sw sw	"	"	"
Se sw	"	"	"
Sw se	"	"	"
Ne ne	5	"	"
Nw ne	"	"	"
Sw ne	"	"	"
Se ne	"	"	"
Ne sw	"	"	"
Nw sw	"	"	"
Sw sw	"	"	"
Se sw	"	"	"
Ne se	"	"	"
Nw se	"	"	"
Sw se	"	"	"
Se se	"	"	"
Se ne	7	"	"
Nw sw	"	"	"
Nw se	"	"	"
Sw se	"	"	"
Nw ne	9	"	"
Sw ne	"	"	"
Ne nw	"	"	"
Nw nw	"	"	"
Sw nw	"	"	"
Se nw	"	"	"
Ne sw	"	"	"
Se se	11	"	"
Nw ne	13	"	"
Sw ne	"	"	"
Ne sw	"	"	"
Sw sw	"	"	"
Se se	"	"	"
Ne ne	15	"	"
Se ne	"	"	"
Ne sw	"	"	"
Nw sw	"	"	"
Sw sw	"	"	"
Se sw	"	"	"
Ne nw	17	"	"

Part of Section.	Section.	Town.	Range.
Nw nw	17	92	36
Sw nw	"	"	"
Ne sw	"	"	"
Nw sw	"	"	"
Sw sw	"	"	"
Se sw	"	"	"
Nw se	"	"	"
Sw se	"	"	"
Ne se	"	"	"
Ne ne	"	"	"
Nw ne	"	"	"
Sw ne	"	"	"
Se ne	"	"	"
Sw se	19	"	"
Sw sw	"	"	"
Ne ne	21	"	"
Nw ne	"	"	"
Sw ne	"	"	"
Se ne	"	"	"
183 Ne nw	"	"	"
Nw nw	"	"	"
Sw nw	"	"	"
Se nw	"	"	"
Se ne	23	"	"
Sw nw	"	"	"
Se sw	"	"	"
Sw ne	25	"	"
Sw sw	"	"	"
Ne ne	27	"	"
Se ne	"	"	"
Ne se	"	"	"
Se se	"	"	"
Se se	29	"	"
Ne se	"	"	"
Nw se	"	"	"
Sw se	"	"	"
Se se	31	"	"
Ne se	"	"	"
Ne nw	33	"	"
Nw nw	"	"	"
Sw nw	"	"	"
Se nw	"	"	"
Ne sw	"	"	"
Nw sw	"	"	"
Sw sw	"	"	"
Se sw	"	"	"
Nw ne	35	"	"
Ne nw	"	"	"
Nw nw	35	"	"
Sw nw	"	"	"
Se nw	"	"	"
Ne sw	"	"	"
Nw sw	"	"	"
Sw sw	"	"	"
Ne se	15	93	"
Ne ne	21	"	"
Sw ne	"	"	"
Se ne	"	"	"
Ne se	"	"	"
Ne ne	23	"	"
Nw ne	"	"	"

Part of Section.	Section.	Town.	Range.
Sw ne	23	93	36
Se ne	"	"	"
Nw nw	"	"	"
Sw sw	"	"	"
Ne se	"	"	"
Se se	27	"	"
Ne nw	29	"	"
Nw nw	"	"	"
Sw nw	"	"	"
Se nw	"	"	"
Ne sw	"	"	"
Nw sw	"	"	"
Sw sw	"	"	"
Se sw	"	"	"
Nw se	"	"	"
Sw se	"	"	"
Se se	"	"	"
All	33	"	"
Ne nw	35	"	"
Nw nw	"	"	"
Sw nw	"	"	"
Se nw	"	"	"
Ne sw	"	"	"
Nw sw	"	"	"
Sw sw	"	"	"
Se sw	"	"	"
Ne nw	5	90	37
Nw nw	"	"	"
Sw nw	"	"	"
Se nw	"	"	"
Lots 2, 3, and 6	"	"	"
Nw ne	"	"	"
Sw ne	"	"	"
Ne sw	"	"	"
Lot 3	11	"	"
Ne sw	1	91	"
Sw nw	3	"	"
Nw sw	"	"	"
Sw sw	"	"	"
Nw nw	15	"	"
Ne sw	"	"	"
Se sw	"	"	"
Sw ne	17	"	"
Nw nw	21	"	"
Sw nw	"	"	"
Se nw	25	"	"
Sw nw	"	"	"
Se ne	27	"	"
Ne se	"	"	"

Part of Section.	Section.	Town.	Range.
Nw se	33	91	37
Ne se	"	"	"
Nw se	35	"	"
Nw ne	1	92	"
Sw nw	9	"	"
Se se	11	"	"
Ne ne	13	"	"
Se se	17	"	"
Ne ne	21	"	"
Nw ne	"	"	"
Sw ne	"	"	"
Ne se	1	93	"
Se se	"	"	"
Sw se	"	"	"
Se ne	3	"	"
Ne ne	"	"	"
Nw ne	"	"	"
184 Ne nw	"	"	"
Nw nw	"	"	"
Sw sw	5	"	"
Se sw	"	"	"
Se se	"	"	"
Sw se	"	"	"
Se nw	11	"	"
Nw nw	"	"	"
Ne sw	"	"	"
Se se	"	"	"
Sw se	"	"	"
Ne se	21	"	"
Se se	"	"	"
Ne ne	27	"	"
Sw nw	29	"	"
Nw sw	"	"	"
Se se	31	93	37
Ne sw	33	"	"
Se nw	15	90	38
Ne ne	31	"	"
Nw ne	"	"	"
Se se	"	"	"
Sw se	"	"	"
Sw sw	5	91	"
Ne se	25	"	"
Sw nw	27	"	"
Sw nw	25	92	"
Ne ne	"	"	"
Nw se	3	93	"
Sw se	"	"	"
Sw se	11	"	"
Se se	"	"	"

and that the title thereto, and to each tract thereof, on the payment of said sum, be fully established and enforced, and that after such payment is made, the defendant be barred and estopped from having or claiming any interest therein or title thereto adverse to plaintiff, provided the plaintiff shall, within six months after the entry of this decree, or within six months after the final decision of this cause upon appeal, if an appeal shall be brought from this judgment, elect to pay the same, and shall, upon demand, issue its orders therefor,

and if it shall fail to elect, then the petition shall be dismissed at plaintiff's cost, taxed at one hundred and seventy-six and eighty-five hundredths dollars; and it is further adjudged, that in case the plaintiff pays the said sum to the defendants, as aforesaid, that the costs of this action, taxed at one hundred and seventy-six and eighty-five hundredths dollars, shall be paid by the defendant; and to each and every finding, order, judgment, and decision made each party hereto did, at the time of the making thereof, duly except, and the said parties are, respectively, allowed until the first day of April next, in which to prepare and cause their several exceptions herein to be settled by the judge of this court, and all the evidence having been reduced to writing, pursuant to the order of this court, the same is directed to be prepared by the respective parties
185 within the time aforesaid, to be certified by the judge of this court upon appeal by either party.

ED. R. DUFFIE,
Judge of the District Court.

And the judge, at the time of signing said decree, certified the evidence aforesaid, as follows:

[Title of the Cause.]

I hereby certify that the foregoing is all the documentary evidence given upon the trial of this cause, and that the short-hand notes of C. A. Mosier, reporter, herewith filed, contain all the oral evidence, and that no other or further evidence was given by either party upon said trial, dated December fourth, 1879.

ED. R. DUFFIE,
Judge of the District Court.

The schedules and exhibits referred to in the foregoing abstract, and made a part thereof, are as follows:

SCHEDULE A.

Plaintiff's list of selections made a part of the foregoing abstract, and referred to therein as follows:

1. The original petition, p. 2.
2. Decree, p. 10.
3. Defendant's petition for new trial, p. 26.
4. Plaintiff's answer, p. 45.
5. Reply, p. 81.
6. Amended petition, p. 83.
7. Read in evidence, p. 110.

Headed—

A List of the Swamp and Overflowed Lands situated in the County of Buena Vista and State of Iowa.

Part of Section.	Section.	Town.	Range.	Acres.	Remarks.
Sw ne	3	90	36	40	Swampy prairie.
Se ne	"	"	"	40	"
N fr. nw	"	"	"	63.10	"
Sw nw	5	"	"	40	"
Se sw	"	"	"	40	"
186 Se nw	"	"	"	40	"
Ne nw	9	"	"	40	"
Se nw	"	"	"	40	"
Se sw	"	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Nw se	"	"	"	40	"
Ne ne	11	"	"	40	"
Sw ne	"	"	"	40	"
Se nw	15	"	"	40	"
Sw sw	"	"	"	40	"
Ne nw	17	"	"	40	"
Nw nw	"	"	"	40	"
Sw nw	"	"	"	40	"
Nw sw	"	"	"	40	"
Se ne	19	"	"	40	"
Sw ne	"	"	"	40	"
Ne ne	"	"	"	40	"
Ne se	"	"	"	40	"
Nw se	"	"	"	40	"
Ne ne	21	"	"	40	"
Sw ne	"	"	"	40	"
Nw nw	"	"	"	40	"
Ne nw	"	"	"	40	"
Sw nw	"	"	"	40	"
Se ne	"	"	"	40	"
Sw sw	"	"	"	40	"
Ne se	"	"	"	40	"
Se se	"	"	"	40	"
Ne nw	23	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Se sw	"	"	"	40	"
Ne nw	27	"	"	40	"
Nw nw	"	"	"	40	"

Part of Section.	Section.	Town.	Range.	Acres.	Remarks.
Nw sw	27	90	36	40	Swampy prairie.
Nw ne	29	"	"	40	"
Ne nw	"	"	"	40	"
Nw nw	"	"	"	40	"
Sw nw	"	"	"	40	"
Se nw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Sw se	"	"	"	40	"
Ne se	"	"	"	40	"
Se se	"	"	"	40	"
Sw nw	33	"	"	40	"
Se nw	"	"	"	40	"
Se se	"	"	"	40	"
Nw nw	35	"	"	40	"
Sw nw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Ne nw	1	91	"	40	"
187 Se ne	3	"	"	40	"
Sw ne	"	"	"	40	"
Ne ne	"	"	"	40	"
Nw nw	"	"	"	40	"
Ne se	"	"	"	40	"
Nw se	"	"	"	40	"
Se se	"	"	"	40	"
Ne ne	5	"	"	40	"
Nw ne	"	"	"	40	"
Sw ne	"	"	"	40	"
Se ne	"	"	"	40	"
Nw nw	"	"	"	40	"
Ne sw	"	"	"	40	"
Se sw	"	"	"	40	"
Nw se	"	"	"	40	"
Sw se	"	"	"	40	"
Sw sw	7	"	"	40	"
Ne se	"	"	"	40	"
Se nw	9	"	"	40	"
Nw nw	"	"	"	40	"
Sw nw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Sw sw	11	"	"	40	"
Nw se	"	"	"	40	"
Ne se	"	"	"	40	"

Part of Section.	Section.	Town.	Range.	Acres.	Remarks.
Se se	11	91	36	40	Swampy prairie.
Se nw	13	"	"	40	"
Sw se	"	"	"	40	"
Ne se	"	"	"	40	"
Nw se	"	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Se sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Ne ne	17	"	"	40	"
Nw ne	"	"	"	40	"
Sw ne	"	"	"	40	"
Se ne	"	"	"	40	"
Sw nw	"	"	"	40	"
Se nw	"	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Ne se	"	"	"	40	"
Nw se	"	"	"	40	"
Se se	"	"	"	40	"
Se ne	19	"	"	40	"
Nw nw	"	"	"	40	"
Sw sw	"	"	"	40	"
Ne se	"	"	"	40	"
Nw se	"	"	"	40	"
Ne ne	21	"	"	40	"
Sw nw	"	"	"	40	"
Nw sw	"	"	"	40	"
Nw ne	25	"	"	40	"
Sw ne	"	"	"	40	"
188 Nw se	"	"	"	40	"
Ne se	"	"	"	40	"
Sw se	"	"	"	40	"
Se se	"	"	"	40	"
Sw ne	27	"	"	40	"
Ne se	"	"	"	40	"
Nw se	"	"	"	40	"
Se ne	29	"	"	40	"
Sw nw	"	"	"	40	"
Ne sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Se sw	"	"	"	40	"
Ne se	"	"	"	40	"
Se se	"	"	"	40	"

Part of Section.	Section.	Town.	Range.	Acres.	Remarks.
Ne ne	31	91	36	40	Swampy prairie
Ne nw	"	"	"	40	"
Nw nw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Se se	"	"	"	40	"
Nw nw	33	"	"	40	"
Sw nw	"	"	"	40	"
Ne nw	35	"	"	40	"
Nw nw	"	"	"	40	"
Sw nw	"	"	"	40	"
Se sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Ne ne	1	92	"	40	"
Se ne	"	"	"	40	"
Se se	"	"	"	40	"
Ne ne	3	"	"	40	"
Se ne	"	"	"	40	"
Nw nw	"	"	"	40	"
Ne sw	"	"	"	40	"
Se sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Sw se	"	"	"	40	"
Ne ne	5	"	"	40	"
Se ne	"	"	"	40	"
Nw ne	"	"	"	40	"
Sw ne	"	"	"	40	"
Ne se	"	"	"	40	"
Nw se	"	"	"	40	"
Se se	"	"	"	40	"
Sw se	"	"	"	40	"
Ne sw	"	"	"	40	"
Se sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Nw sw	7	"	"	40	"
Sw ne	"	"	"	40	"
Se ne	"	"	"	40	"
Nw sw	"	"	"	40	"
Nw se	"	"	"	40	"
189 Sw se	"	"	"	40	"
Nw ne	9	"	"	40	"
Sw ne	"	"	"	40	"
Ne nw	"	"	"	40	"
Nw nw	"	"	"	40	"

Part of Section.	Section.	Town.	Range.	Acres.	Remarks.
Sw nw	9	92	36	40	Swampy prairie.
Se nw	"	"	"	40	"
Ne sw	"	"	"	40	"
Se se	11	"	"	40	"
Nw ne	13	"	"	40	"
Sw ne	"	"	"	40	"
Ne sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Se se	"	"	"	40	"
Ne ne	15	"	"	40	"
Se ne	"	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Se sw	"	"	"	40	"
Ne ne	17	"	"	40	"
Nw ne	"	"	"	40	"
Sw ne	"	"	"	40	"
Se ne	"	"	"	40	"
Ne nw	"	"	"	40	"
Nw nw	"	"	"	40	"
Sw nw	"	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Se sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Ne se	"	"	"	40	"
Nw se	"	"	"	40	"
Sw se	"	"	"	40	"
Se ne	19	"	"	40	"
Nw ne	"	"	"	40	"
Sw ne	"	"	"	40	"
Sw sw	"	"	"	40	"
Nw se	"	"	"	40	"
Sw se	"	"	"	40	"
Se se	"	"	"	40	"
Ne ne	21	"	"	40	"
Nw ne	"	"	"	40	"
Sw ne	"	"	"	40	"
Se ne	"	"	"	40	"
Ne nw	"	"	"	40	"
Nw nw	"	"	"	40	"
Sw nw	"	"	"	40	"
Se nw	"	"	"	40	"
Ne sw	"	"	"	40	"

Part of Section.	Section.	Town.	Range.	Acres.	Remarks.
Nw sw	21	92	36	40	Swampy prairie.
Sw sw	"	"	"	40	"
Se sw	"	"	"	40	"
Se ne	23	"	"	40	"
Sw nw	"	"	"	40	"
190 Se sw	"	"	"	40	"
Sw nw	25	"	"	40	"
Sw sw	"	"	"	40	"
Ne ne	27	"	"	40	"
Se ne	"	"	"	40	"
Ne se	"	"	"	40	"
Se se	"	"	"	40	"
Se se	29	"	"	40	"
Ne se	"	"	"	40	"
Nw se	"	"	"	40	"
Ne nw	"	"	"	40	"
Nw nw	"	"	"	40	"
Sw nw	"	"	"	40	"
Se nw	"	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Se sw	"	"	"	40	"
Sw ne	31	"	"	40	"
Nw sw	"	"	"	40	"
Ne se	"	"	"	40	"
Se se	"	"	"	40	"
Ne nw	33	"	"	40	"
Nw nw	"	"	"	40	"
Sw nw	"	"	"	40	"
Se nw	"	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Se sw	"	"	"	40	"
Nw ne	35	"	"	40	"
Ne nw	"	"	"	40	"
Nw nw	"	"	"	40	"
Sw nw	"	"	"	40	"
Se nw	"	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Ne se	15	93	"	40	"
Nw se	19	"	"	40	"

Part of Section.	Section.	Town.	Range.	Acres.	Remarks.
Sw fr. sw	19	93	36	32.02	Swampy prairie.
Ne ne	21	"	"	40	"
Nw ne	"	"	"	40	"
Sw ne	"	"	"	40	"
Se ne	"	"	"	40	"
Ne se	"	"	"	40	"
Ne ne	23	"	"	40	"
Nw ne	"	"	"	40	"
Sw ne	"	"	"	40	"
Se ne	"	"	"	40	"
Nw nw	"	"	"	40	"
Sw sw	"	"	"	40	"
Ne se	"	"	"	40	"
Se se	27	"	"	40	"
Ne nw	29	"	"	40	"
191 Nw nw	"	"	"	40	"
Sw nw	"	"	"	40	"
Se nw	"	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Se sw	"	"	"	40	"
Nw se	"	"	"	40	"
Sw se	"	"	"	40	"
Se se	"	"	"	40	"
Nw fr. sw	31	"	"	37.07	"
Sw fr. sw	"	"	"	37.35	"
Ne ne	33	"	"	40	"
Nw ne	"	"	"	40	"
Sw ne	"	"	"	40	"
Se ne	"	"	"	40	"
Ne nw	"	"	"	40	"
Nw nw	"	"	"	40	"
Se nw	"	"	"	40	"
Sw nw	"	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Se sw	"	"	"	40	"
Ne se	"	"	"	40	"
Nw se	"	"	"	40	"
Sw se	"	"	"	40	"
Se se	"	"	"	40	"
Ne nw	35	"	"	40	"
Nw nw	"	"	"	40	"

Part of Section.	Section.	Town.	Range.	Acres.	Remarks.
Sw nw	35	93	36	40	Swampy prairie.
Se nw	"	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Se sw	"	"	"	40	"
Se ne	3	90	37	40	"
Sw sw	"	"	"	40	"
Nw fr. ne	5	"	"	35.84	"
Sw ne	"	"	"	40	"
Ne fr. nw	"	"	"	36.14	"
Nw fr. nw	"	"	"	36.43	"
Sw nw	"	"	"	40	"
Se nw	"	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Lot No. 6	"	"	"	33.20	"
Lot No. 2	"	"	"	31.60	"
Lot No. 3	"	"	"	59.70	"
Ne nw	7	"	"	40	"
Nw nw	"	"	"	40	"
Nw sw	"	"	"	40	"
Lot 1	9	"	"	18.20	"
Lot 2	"	"	"	22.50	"
192 Lot 3	11	"	"	24.80	"
Lot 4	"	"	"	32.80	"
Ne ne	13	"	"	40	"
Nw ne	"	"	"	40	"
Se ne	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Ne se	"	"	"	40	"
Ne ne	25	"	"	40	"
Se se	"	"	"	40	"
Se nw	31	"	"	40	"
Ne se	35	"	"	40	"
Se se	"	"	"	40	"
Ne sw	1	91	"	40	"
Se sw	"	"	"	40	"
Se se	"	"	"	40	"
Ne fr. ne	3	"	"	38.97	"
Se ne	"	"	"	40	"
Sw nw	"	"	"	40	"
Nw sw	"	"	"	40	"

Part of Section.	Section.	Town.	Range.	Acres.	Remarks.
Sw sw	3	91	37	40	Swampy prairie.
Ne se	"	"	"	40	"
Se se	"	"	"	40	"
Ne ne	11	"	"	40	"
Ne sw	"	"	"	40	"
Se sw	"	"	"	40	"
Ne se	"	"	"	40	"
Ne ne	13	"	"	40	"
Sw sw	"	"	"	40	"
Se se	"	"	"	40	"
Ne ne	15	"	"	40	"
Nw ne	"	"	"	40	"
Nw nw	"	"	"	40	"
Sw nw	"	"	"	40	"
Sw ne	17	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Se sw	"	"	"	40	"
Sw se	"	"	"	40	"
Se se	"	"	"	40	"
Nw nw	21	"	"	40	"
Sw nw	"	"	"	40	"
Se se	"	"	"	40	"
Se sw	23	"	"	40	"
Se ne	25	"	"	40	"
Sw nw	"	"	"	40	"
Se nw	"	"	"	40	"
Ne se	"	"	"	40	"
Sw ne	27	"	"	40	"
Se ne	"	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Ne se	"	"	"	40	"
Sw se	29	"	"	40	"
193 Ne ne	33	"	"	40	"
Ne se	"	"	"	40	"
Nw se	"	"	"	40	"
Ne ne	35	"	"	40	"
Nw ne	"	"	"	40	"
Se nw	"	"	"	40	"
Se sw	"	"	"	40	"
Ne se	"	"	"	40	"
Nw se	"	"	"	40	"
Sw se	"	"	"	40	"

Part of Section.	Section.	Town.	Range.	Acres.	Remarks.
Se se	35	91	37	40	Swampy prairie.
Se ne	1	92	"	40	"
Ne fr. ne	"	"	"	46.17	"
Nw fr. ne	"	"	"	46.51	"
Nw sw	"	"	"	40	"
Ne fr. ne	3	"	"	46.09	"
Sw sw	"	"	"	40	"
Ne se	"	"	"	40	"
Ne sw	7	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Se sw	"	"	"	40	"
Ne ne	9	"	"	40	"
Ne nw	"	"	"	40	"
Nw nw	"	"	"	40	"
Sw nw	"	"	"	40	"
Se nw	"	"	"	40	"
Nw nw	11	"	"	40	"
Ne sw	"	"	"	40	"
Se sw	"	"	"	40	"
Se se	"	"	"	40	"
Ne ne	13	"	"	40	"
Sw nw	15	"	"	40	"
Ne sw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Se sw	"	"	"	40	"
Ne se	"	"	"	40	"
Nw sw	17	"	"	40	"
Sw sw	"	"	"	40	"
Ne sw	"	"	"	40	"
Se sw	"	"	"	40	"
Sw nw	"	"	"	40	"
Se se	"	"	"	40	"
Nw fr. nw	19	"	"	44.73	"
Se nw	"	"	"	40	"
Nw sw	"	"	"	40	"
Se sw	"	"	"	40	"
Ne ne	21	"	"	40	"
Nw ne	"	"	"	40	"
Sw ne	"	"	"	40	"
Se ne	"	"	"	40	"
Nw se	"	"	"	40	"
Ne ne	27	"	"	40	"
Nw sw	"	"	"	40	"

Part of Section.	Section.	Town.	Range.	Acres.	Remarks.
194 Se sw	29	92	37	40	Swampy prairie.
Se se	"	"	"	40	"
Nw nw	35	"	"	40	"
Ne se	1	93	"	40	1 to 2 ft. overflow Little Sioux.
Nw se	"	"	"	40	" " "
Se se	"	"	"	40	3 to 4 feet "
Sw se	"	"	"	40	2 to 4 feet "
Se ne	"	"	"	40	1 to 2 feet "
Se ne	3	"	"	40	Depth of overflow 2 to 4 feet.
Ne fr. ne	"	"	"	45.15	" " "
Nw fr. ne	"	"	"	48.64	" " "
Ne fr. nw	"	"	"	48.13	" " 2 to 4 feet.
Nw fr. nw	"	"	"	47.62	" " "
Sw nw	"	"	"	40	" " "
Ne se	"	"	"	40	" " "
Sw sw	5	"	"	40	overflow 2 to 3 feet.
Se sw	"	"	"	40	" "
Sw se	"	"	"	40	" "
Se se	"	"	"	40	" "
Nw fr. nw	7	"	"	57.33	" 2 to 4 feet.
Se nw	11	"	"	40	" 3 to 4 feet.
Nw nw	"	"	"	40	" "
Ne sw	"	"	"	40	" "
Sw se	"	"	"	40	" "
Se se	"	"	"	40	" "
Nw nw	13	"	"	40	" 2 to 5 feet.
Nw fr. nw	19	"	"	48.50	Swampy prairie.
Ne se	21	"	"	40	"
Se se	"	"	"	40	"
Se ne	25	"	"	40	"
Se se	"	"	"	40	"
Ne ne	27	"	"	40	"
Nw nw	29	"	"	40	"
Sw nw	"	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Se se	31	"	"	40	"
Ne sw	33	"	"	40	"
Nw sw	"	"	"	40	"
Sw sw	"	"	"	40	"
Ne se	"	"	"	40	"
Nw se	"	"	"	40	"
Se se	"	"	"	40	"
Sw sw	35	"	"	40	"
Ne se	"	"	"	40	"

Part of Section.	Section.	Town.	Range.	Acres.	Remarks.
Nw se	35	93	37	40	Swampy prairie.
Ne ne	7	90	38	40	"
Se ne	"	"	"	40	"
Sw sw	9	"	"	40	"
Se sw	"	"	"	40	"
Ne se	11	"	"	40	"
Se ne	13	"	"	40	"
Nw ne	15	"	"	40	"
Se nw	"	"	"	40	"
Nw sw	"	"	"	40	"
195 Nw ne	"	"	"	40	"
Sw ne	"	"	"	40	"
Se ne	"	"	"	40	"
Se ne	21	"	"	40	"
Nw ne	"	"	"	40	"
Sw nw	"	"	"	40	"
Se nw	"	"	"	40	"
Ne nw	25	"	"	40	"
Nw nw	"	"	"	40	"
Sw sw	"	"	"	40	"
Se se	"	"	"	40	"
Sw se	29	"	"	40	"
Se se	"	"	"	40	"
Ne ne	31	"	"	40	"
Nw ne	"	"	"	40	"
Sw se	"	"	"	40	"
Se se	"	"	"	40	"
Sw sw	5	91	"	40	"
Se se	"	"	"	40	"
Sw nw	17	"	"	40	"
Ne ne	25	"	"	40	"
Ne se	"	"	"	40	"
Ne ne	27	"	"	40	"
Sw nw	"	"	"	40	"
Nw sw	"	"	"	40	"
Se se	"	"	"	40	"
Ne se	31	"	"	40	"
Nw se	"	"	"	40	"
Se ne	13	92	"	40	"
Nw ne	"	"	"	40	"
Sw ne	"	"	"	40	"
Sw sw	"	"	"	40	"
Se sw	"	"	"	40	"

Part of Section.	Section.	Town.	Range.	Acres.	Remarks.
Nw se	13	92	33	40	Swampy prairie.
Sw se	"	"	"	40	"
Sw sw	15	"	"	40	"
Se sw	"	"	"	40	"
Ne ne	25	"	"	40	"
Nw ne	"	"	"	40	"
Sw nw	"	"	"	40	"
Se sw	"	"	"	40	"
Ne ne	27	"	"	40	"
Sw ne	33	"	"	40	"
Se ne	"	"	"	40	"
Se ne	35	"	"	40	"
Nw se	3	93	"	40	Overflow 1 to 3 feet.
Sw se	"	"	"	40	"
Ne sw	11	"	"	40	"
Sw sw	"	"	"	40	"
Sw se	"	"	"	40	"
Se se	"	"	"	40	"

[Here follow the affidavits of Ringland, Hait, Z. Tucker, and J. W. Tucker, and certificate of J. B. Miller, printed *supra*, pages 46–7.]

196 Annexed to all which is the following certificate:

STATE OF IOWA, STATE LAND OFFICE,
DES MOINES, IOWA, *April* 17, 1879.

I, J. K. Powers, register of the State land office of the State of Iowa, hereby certify that the foregoing is a true copy of a list of swamp land selections of Buena Vista county, Iowa, as the same appears of record in this office.

In testimony whereof, I have hereunto set my hand and affixed my official seal, the date above written.

[SEAL.] J. K. POWERS, *Register.*

SCHEDULE B.

A List of Lands sold by Defendant, attached to its Answer as a part thereof, supra, page nine.

Part of Sec.	Section.	Township.	Range.	Name of purchaser.	Date of sale.	No. of acres.	Price per acre.	Amount.	Amount paid.
Nw sw	19	91	36	Edward Deland	Aug. 31, 1876	40.61	$7 00	$284 27	$71 06
Se ne	3	90	37	S. C. & I. F. T. I. & L. Co	Oct. 31, 1872	40	5 00	200 00	200 00
Sw sw	3	90	37	S. C. & I. F. T. I. & L. Co	Oct. 31, 1872	40	5 00	200 00	200 00
Nw sw	5	90	37	L. A. Clemons	M'ch 30, 1874	40	10 00	400 00	300 00
Sw sw	5	90	37	do do	July 9, 1873	40	9 00	360 00	All.
Lots 1 & 2	9	90	37	Harriet C. Wirick	Nov. 19, 1873	40.80	15 00	612 00	152 99
Lot 3	11	90	37	C. H. Moore	Feb. 29, 1876	24.80	15 00	372 00	93 00
Lot 4	11	90	37	Luther Adams	Feb. 24, 1873	32.80	13 50	442 80	442 80
N ½ ne	13	90	37	do do	Oct. 3, 1872	80	8 00	640 00	160 00
Se ne	13	90	37	do do	do do	40	8 00	320 00	80 00
W ½ sw	13	90	37	do do	do do	80	8 00	640 00	160 00
Ne se	13	90	37	do do	do do	40	8 00	320 00	80 00
Se ne	31	90	37	A. L. Stetson	July 28, 1875	40	6 30	252 00	252 00
Ne sw	11	91	37	Thomas Rowe	Nov 6, 1875	40	6 00	240 00	120 00
Se se	13	91	37	M. Dorfmeister	Oct. 28, 1875	40	7 70	308 00	61 60
Nw ne	15	91	37	F. Schar	May 19, 1876	40	7 70	308 00	61 60
Nw sw	17	91	37	H. Raymond	Oct. 12, 1874	40	7 70	308 00	61 60
S ½ sw	17	91	37	E. L. Carrington	Oct. 25, 1874	80	7 70	616 00	123 20
Sw ne	27	91	37	W. S. McBride	M'ch 31, 1875	40	10 00	400 00	200 00
N ½ sw	27	91	37	C. W. Andredge	June 11, 1874	80	10 00	800 00	430 00
Sw se	29	91	37	M. L. Hobart	Sept. 29, 1871	40	9 00	360 00	360 00
Ne ne	33	91	37	C. H. Sheratt	Nov. 28, 1871	40	11 00	440 00	440 00
N ½ se	33	91	37	Chas. E. Vail	June 9, 1871	80	5 00	400 00	400 00
Sw sw	35	91	37	John Brown	Dec. 27, 1875	40	10 00	400 00	100 00
S ½ se	35	91	37	K. Maulshagen	July 19, 1876	80	11 00	880 00	176 00
197 Sw	7	92	37	D. Schofield	Oct. 12, 1874	160.91	4 50	759 96	759 96
S ½ sw	17	92	37	C. Johnson	Oct. 30, 1874	80	5 50	440 00	60 00
Nw nw	19	92	27	Hans Peterson	July 7, 1874	44.73	5 50	246 01	49 21
Se nw	19	92	27	A. & J. Olson	July 3, 1876	40	5 50	220 00	44 00
Nw sw	19	92	27	J. A. Johnson	Sept. 19, 1874	44.60	4 50	200 39	200 39
Se sw	19	92	27	Peter Anderson	June 11, 1874	40	5 00	200 00	50 00
Ne ne	27	92	27	L. Cornnell	Sept. 23, 1874	40	5 50	220 00	88 00
Nw sw	27	92	27	James Daffy	do do	40	5 50	220 00	88 00
Se sw	29	92	27	C. C. McComes	Feb. 8, 1875	40	4 50	180 00	180 00
Se se	29	92	27	do do	do do	40	4 50	180 00	180 00
Nw nw	39	83	27	N. Brady	Jan. 19, 1874	40	5 00	200 00	150 00
Se ne	1	83	37	State of Iowa	July 20, 1876	40	2 95	118 00	118 00
Ne se	1	83	37	do do	do do	40	2 95	118 00	118 00
Sw sw	5	83	37	T. Marble	July 20, 1872	40	6 00	240 00	100 00
Nw sw	29	83	37	A. Michaelson	May 20, 1874	40	5 50	220 00	88 00
Ne ne	7	90	38	L. P. Larsen	April 7, 1875	40	6 60	264 00	52 80
Se ne	7	90	38	John Johnson	April 6, 1875	40	6 60	264 00	52 80
Sw sw	9	90	38	T. Surgeon	April 3, 1873	40	7 00	280 00	210 00
Se sw	9	90	38	J. Keler	May 16, 1873	40	7 00	280 00	123 20
Ne ne	11	90	38	W. F. Philips	June 2, 1875	40	7 70	308 00	61 60
Se ne	13	90	38	H. Holcomb	Feb. 3, 1872	40	7 00	280 00	280 00
nw ne	15	90	38	G. & D. Clarkson	May 13, 1872	40	7 00	280 00	280 00
Se nw	15	90	38	do do	do do	40	7 00	280 00	280 00
Nw sw	15	90	38	do do	do do				
W ½ ne	19	90	38	J. H. & W. Schmidt	June 10, 1875	40 80	7 00 6 00	280 00 480 00	280 00 360 00

SCHEDULE B.—*A List of Lands sold by Defendant, &c.*—Continued.

Part of Sec.	Section.	Township.	Range.	Name of purchaser.	Date of sale.	No. of acres.	Price per acre.	Amount.	Amount paid.
Se ne	19	90	38	R. Godfrey	April 23, 1875	40	$5 40	$432 00	$432 00
Se ne	21	90	38	C. H. Dailey	M'ch 28, 1874	40	6 60	264 00	108 75
Nw ne	21	90	38	C. Gertzmeier	M'ch 30, 1874	40	6 60	264 00	108 75
S ½ nw	21	90	38	J. Nehler and D. Browning	M'ch 24, 1876	80	7 60	608 00	608 00
N ½ nw	25	90	38	George Stetson	M'ch 8, 1875	80	6 00	480 00	240 00
S ½ sw	25	90	38	Ellen Perrine	Oct. 21, 1874	80	4 50	432 00	432 00
Se se	25	90	38	George Stetson	April 19, 1875	40	4 50	216 00	216 00
Sw sw	5	91	38	S. Tucker	Sept. 2, 1875	40	8 00	320 00	80 00
Se se	5	91	38	do do	do do	40	8 00	320 00	160 00
Sw nw	17	91	38	P. Carlson	July 26, 1875	40	8 80	352 00	65 45
Ne ne	25	91	38	R. C. Richels	Aug. 31, 1874	40	9 00	360 00	360 00
Ne se	25	91	38	R. D. Dodge	Oct. 25, 1875	40	9 90	396 60	79 20
Ne ne	27	91	38	Chas. E. Vail	June 9, 1871	40	5 00	200 00	200 00
Sw nw	27	91	38	R. C. Chapman	Oct. 27, 1874	40	10 00	400 00	300 00
Nw sw	7	91	38	do do	do do	40	10 00	400 00	300 00
Se se	27	91	38	P. H. Aspholm	May 29, 1873	40	11 00	440 00	167 00
N ½ se	31	91	38	J. Cowman	Nov. 11, 1873	80	7 00	560 00	123 00
Se ne	13	92	38	Lars Johnsen	June 23, 1874	40	5 50	220 00	97 00
Nw ne	13	92	38	Peter Jensen	Sept. 24, 1874	40	5 00	200 00	150 00
S ½ sw	15	92	38	John S. Hoover	June 13, 1873	80	6 60	528 00	105 60
Ne ne	25	92	38	E. Schultze	Feb. 21, 1876	40	6 00	240 00	60 00
Nw ne	25	92	38	G. Ghere	Feb. 5, 1876	40	6 60	264 00	52 80
Se se	25	92	38	A. Fedland	M'ch 25, 1874	40	6 00	240 00	180 00
Ne ne	27	92	38	F. Miller & C. Herbst	Dec. 17, 1873	40	6 60	264 00	264 00
Sw ne	33	92	38	A. Bradfield	Sept. 11, 1875	40	7 70	308 00	61 60
Se ne	33	92	38	C. Schlafke	Aug. 25, 1875	40	7 70	308 00	108 75
Se ne	35	92	38	H K. Hanson	Aug. 11, 1873	40	6 60	264 00	158 40
Ne sw	35	93	38	C. Kirchner	June 23, 1872	40	4 50	180 00	180 00
Sw sw	35	93	38	Wm. Brooks	Jan. 11, 1873	40	5 00	200 00	200 00
Se se	35	93	38	Wm. Brooks	Jan. 11, 1873	40	5 00	200 00	200 00

198 SCHEDULE C.

A List of the Lands Described in Regan's Affidavit, making a part of Defendant's Petition for a New Trial, supra, page twenty-nine.

Part of Section.	Section.	Town.	Range.	Part of Section.	Section.	Town.	Range.
Sw nw	17	90	36	Nw nw	19	91	36
Nw sw	"	"	"	Sw nw	29	"	"
Ne ne	19	"	"	Nw sw	"	"	"
Se ne	"	"	"	Sw sw	"	"	"
Sw ne	"	"	"	Ne ne	31	"	"
Nw se	"	"	"	Ne nw	"	"	"
Sw nw	29	"	"	Nw nw	"	"	"
Nw sw	17	91	"	Nw sw	"	"	"
Se ne	19	"	"	Sw sw	"	"	"
Nw se	"	"	"	Se se	"	"	"
Ne se	"	"	"	Se se	31	92	"

SCHEDULE C.—*A List of the Lands Described, &c.*—Continued.

Part of Section.	Section.	Town.	Range.
Sw ne	31	92	36
Nw sw	"	"	"
Sw se	19	"	"
Se se	"	"	"
Nw se	"	"	"
Sw ne	"	"	"
Se ne	"	"	"
Nw ne	"	"	"
Se ne	7	"	"
Sw ne	"	"	"
Sw sw	31	93	"
Nw sw	"	"	"
Sw sw	19	"	"
Nw se	"	"	"
Lot 4	3	90	37
Se ne	"	"	"
Sw nw	5	"	"
Nw sw	"	"	"
Ne nw	7	"	"
Nw nw	"	"	"
Nw sw	"	"	"
Lot 1	9	"	"
Lot 2	"	"	"
Lot 4	11	"	"
Ne ne	13	"	"
Nw ne	"	"	"
Se ne	"	"	"
Ne se	"	"	"
Sw sw	"	"	"
Nw sw	"	"	"
Ne ne	25	"	"
Se se	"	"	"
Se nw	31	"	"
Se sw	35	91	"
Se nw	"	"	"
Se se	"	"	"
Sw se	"	"	"
Ne se	"	"	"
Ne ne	"	"	"
Nw ne	"	"	"
Ne ne	33	"	"
Nw se	"	"	"
Sw se	29	"	"
Nw sw	27	"	"
Ne sw	"	"	"
Ne se	"	"	"
Sw ne	"	"	"
Se ne	25	"	"
Ne se	"	"	"
Se nw	"	"	"
Se sw	23	"	"
Se se	21	"	"
Se se	17	"	"
Sw se	"	"	"
Nw sw	"	"	"
Sw sw	"	"	"
Nw ne	15	"	"
Ne ne	"	"	"
Sw nw	"	"	"

Part of Section.	Section.	Town.	Range.
Ne ne	13	91	37
Sw sw	"	"	"
Se se	"	"	"
Ne ne	11	"	"
Ne se	"	"	"
Se sw	"	"	"
Ne sw	"	"	"
Ne ne	3	"	"
Se se	"	"	"
Ne se	"	"	"
Se ne	"	"	"
Se sw	1	"	"
Se se	35	92	"
Nw nw	"	"	"
Se se	29	"	"
Se sw	"	"	"
Ne ne	27	"	"
199 Nw sw	"	"	"
Ne se	21	"	"
Se ne	"	"	"
Se sw	19	"	"
Nw sw	"	"	"
Nw nw	"	"	"
Sw nw	"	"	"
Sw sw	17	"	"
Nw sw	"	"	"
Sw nw	"	"	"
Ne sw	"	"	"
Se sw	"	"	"
Sw sw	15	"	"
Se sw	"	"	"
Nw sw	"	"	"
Ne sw	"	"	"
Sw nw	"	"	"
Ne se	"	"	"
Nw nw	9	"	"
Se nw	"	"	"
Ne nw	"	"	"
Ne ne	"	"	"
Sw sw	7	"	"
Ne sw	"	"	"
Se sw	"	"	"
Nw sw	"	"	"
Se sw	11	"	"
Ne sw	"	"	"
Nw nw	"	"	"
Sw sw	3	"	"
Ne ne	"	"	"
Ne ne	1	"	"
Nw sw	"	"	"
Se ne	"	"	"
Se ne	25	93	"
Se se	"	"	"
Sw nw	3	"	"
Ne se	"	"	"
Se ne	1	"	"
Nw se	"	"	"
Sw sw	35	"	"
Nw se	"	"	"

SCHEDULE C.—*A List of the Lands Described, &c.*—Continued.

Part of Section.	Section.	Town.	Range.
Se sw	35	93	37
Se se	33	"	"
Ne se	"	"	"
Nw se	"	"	"
Ne sw	"	"	"
Nw sw	"	"	"
Sw sw	"	"	"
Sw sw	29	"	"
Nw nw	"	"	"
Nw nw	19	"	"
Nw nw	13	"	"
Nw nw	7	"	"
Sw sw	5	"	"
Ne ne	7	90	38
Se ne	"	"	"
Se sw	9	"	"
Sw sw	"	"	"
Ne ne	11	"	"
Se ne	13	"	"
Nw ne	15	"	"
Se nw	"	"	"
Nw sw	"	"	"
Nw ne	19	"	"
Se ne	"	"	"
Sw ne	"	"	"
Nw ne	21	"	"
Se ne	"	"	"
Se nw	"	"	"
Sw nw	"	"	"
Ne nw	25	"	"
Nw ne	"	"	"
Se sw	"	"	"
Sw sw	"	"	"

Part of Section.	Section.	Town.	Range.
Se se	29	90	38
Sw se	"	"	"
Ne ne	31	"	"
Nw ne	"	"	"
Se se	"	"	"
Sw se	"	"	"
Se se	5	91	"
Sw nw	17	"	"
Ne se	25	"	"
Ne ne	"	"	"
Sw sw	27	"	"
Ne ne	"	"	"
Nw sw	"	"	"
Se se	"	"	"
Ne se	31	"	"
Nw se	"	"	"
Nw ne	13	92	"
Se ne	"	"	"
Sw ne	"	"	"
Nw se	"	"	"
Sw se	"	"	"
Se sw	"	"	"
Sw sw	"	"	"
Se sw	15	"	"
Sw sw	"	"	"
Nw ne	25	"	"
Ne ne	27	"	"
Sw ne	33	"	"
Se ne	"	"	"
Se ne	35	"	"
Sw sw	11	93	"
Ne sw	"	"	"

200 EXHIBIT No. 1.

STORM LAKE, IOWA, *May* 22, 1879.

Received of Edgar E. Mack, clerk of the district court of Iowa in and for Buena Vista county, Iowa, the sum of two hundred and fifty dollars, the same being the amount allowed to Galusha Parsons, acting for plaintiff in the case of The County of Buena Vista, Iowa, against The Iowa Falls and Sioux City Railroad Company, allowed him this day.

GALUSHA PARSONS,
Plaintiff's Attorney.

Defendant's Schedule A.

Produced by Mr. Cook and made a part of this testimony, page 174. Payments were made by sections, as stated by him, and the amounts here given are a *pro rata* estimate based upon the number of forties claimed by plaintiff included in each section paid upon. If it shall at any time become material either party is at liberty to show the amount paid or properly chargeable upon each forty.

Tracts.			Amount.	Tracts.			Amount.
Section.	Town.	Range.		Section.	Town.	Range.	
3	90	36	$58 25	25	90	37	$99 95
5	"	"	49 37	31	"	"	19 44
9	"	"	86 60	35	"	"	96 62
11	"	"	58 70	1	91	"	164 17
15	"	"	32 10	3	"	"	384 00
17	"	"	176 54	11	"	"	197 92
19	"	"	323 28	13	"	"	122 84
21	"	"	67 90	15	"	"	179 26
23	"	"	58 50	17	"	"	106 32
27	"	"	42 90	21	"	"	117 27
29	"	"	313 36	23	"	"	103 16
33	"	"	33 35	25	"	"	236 88
35	"	"	56 00	27	"	"	197 81
3	91	"	89 85	35	"	"	344 05
5	"	"	142 38	1	92	"	176 34
7	"	"	83 73	3	"	"	132 23
9	"	"	76 65	7	"	"	53 40
11	"	"	44 95	9	"	"	229 95
17	"	"	219 09	11	"	"	134 82
19	"	"	161 43	15	"	"	281 64
21	"	"	44 05	17	"	"	263 90
27	"	"	44 05	19	"	"	70 10
29	"	"	183 12	21	"	"	230 70
31	"	"	169 89	27	"	"	29 10
33	"	"	29 35	29	"	"	33 10
35	"	"	73 35	35	"	"	14 55
3	92	"	107 40	1	93	"	136 25
5	"	"	100 00	3	"	"	316 01
7	"	"	206 05	5	"	"	124 11
9	"	"	106 45	11	"	"	261 88
15	"	"	91 70	19	"	"	88 15
17	"	"	212 90	25	"	"	174 10
19	"	"	286 20	29	"	"	187 65
21	"	"	170 40	33	"	"	305 85
23	"	"	28 60	35	"	"	128 15
27	"	"	62 25	7	90	38	41 90
201 29	"	"	170 30	9	"	"	28 45
31	"	"	198 33	11	"	"	14 25
33	"	"	152 12	19	"	"	63 15
35	"	"	114 72	21	"	"	90 20
15	93	"	18 85	25	"	"	17 40
19	"	"	114 40	29	"	"	73 92
21	"	"	91 75	5	91	"	44 65
23	"	"	73 40	17	"	"	26 35
27	"	"	21 35	25	"	"	53 80
29	"	"	244 85	27	"	"	58 65
31	"	"	104 10	31	"	"	86 30
33	"	"	271 58	13	92	"	237 04
35	"	"	127 75	15	"	"	114 35
3	90	37	227 07	25	"	"	115 07
5	"	"	602 46	27	"	"	15 65
9	"	"	37 48	33	"	"	46 37
11	"	"	40 05	35	"	"	8 15

The aggregates and times of payment were as follows:

February 5, 1873	$3,720 87
January 15, 1874	3,549 79
February 9, 1875	1,531 81
February 12, 1876	1,554 92
February 28, 1877	1,602 45
January 15, 1878	1,128 74
January 20, 1879	1,071 96
Total	14,160 54

202 The taxes included in these receipts for 1874 were: State, two mills; county, four mills; school, three mills; bridge, three mills; teacher's fund, seven mills, and, contingent, three mills, and were substantially the same for the other years.

Stipulation.

From the above decree each party duly appealed, and it is agreed that the foregoing abstract and schedules contain all the evidence, records, and proceedings in the cause, and that the hearing in the supreme court be had thereupon without a transcript.

GALUSHA PARSONS,
Plaintiff's Attorney.
E. S. BAILEY,
Defendant's Attorney.

203 In the Supreme Court of Iowa.

THE COUNTY OF BUENA VISTA, IN THE STATE OF IOWA,
vs.
THE IOWA FALLS & SIOUX CITY RAILROAD COMPANY.

The following proceedings were had in this court. June 18, 1880, submitted by both parties on printed and oral arguments. December 11, 1880, the court filed the opinion hereafter printed.

March 22, 1881, the plaintiff filed a petition for a rehearing.

April 23, 1881, the plaintiff's petition for a rehearing overruled.

June 9, 1881, a decree was entered in this court as follows:

[Title of the cause.]

JUNE 9, 1881.

This cause having been argued and submitted at the June term, 1880, of this court, Galusha Parsons, Esq., appearing for the plaintiff, and G. S. Robinson and E. S. Bailey for the defendant, both parties having appealed from the decree of the district court of Buena Vista county, and the court being now fully advised in the premises, it is ordered, adjudged, and decreed that the same be affirmed on plaintiff's appeal and reversed on defendant's appeal. And it is further ordered, adjudged, and decreed that the petition of said plaintiff be and the same is hereby dismissed on the merits thereof, and that plaintiff pay the costs of this suit taxed at ——.

June 20, 1881, the following order was made by the court:

[Title of the cause.]

204 And it is further ordered and directed by the court that the matters following be made a part of the records and decree herein, to wit:

I. The plaintiff claimed title to the lands described in its petition, under an act of Congress, passed September 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits."

II. The plaintiff further claimed that under the pleadings in the cause and by the facts therein stated, the defendant was estopped from contesting the plaintiff's claim under the said act of Congress upon any other grounds than those stated and made by it before the land officers of the United States.

III. The plaintiff further claimed that by the act of Congress prescribing the duties of the Secretary of the Interior and the Commissioner of the General Land Office, and by an act of Congress entitled "An act for the relief of Lucas, O'Brien, Dickinson, and other counties, in the State of Iowa," passed March 5, 1872, it became the duty of the Commissioner of the General Land Office to receive and examine its selections of said lands as swamp lands and to allow or disallow the same, and that its title to said lands under the said act of Congress of September 28, 1850, and its proceedings thereunder and under the last-mentioned act was perfect in equity, and that the defendant could not question the same upon any other grounds than those upon which it placed its claims before the land officers.

IV. The plaintiff further claimed upon the argument of said cause that the rights of the parties are governed by the laws of Congress for the reasons following:

1. The lands in controversy were the property of the United States, and they still are, unless a complete legal title has passed from the United States to one or the other of these parties.

2. Whether it has so passed, or not, is to be determined solely by the laws of the United States.

3. The act under which plaintiff claims, in terms made
205 it the duty of the Secretary of the Interior to administer the grant, leaving the means for the performance of that solely to his discretion.

4. The regulations of the Executive Departments of the General Government for the management of business before them, in the absence of an act of Congress to the contrary, have to all intents and purposes the same force as if contained in terms in the statute imposing the duty.

5. In this case the record shows that the Secretary, first, by a general regulation directed both the manner of survey and the proofs by which it should be authenticated; and, second, that he entered into an agreement with the State of Iowa that the lands within its borders should be surveyed and reported in a particular manner.

6. In either case the lands being so selected, whether under the

instructions or agreement, the selections so made could be impeached for fraud only, and for that only before the Secretary.

7. No one but the holder of an adverse title derived from the United States, and good if plaintiff's were out of the way, could question either the manner or sufficiency of plaintiff's proofs, and such a one only in the manner prescribed by the Secretary of the Interior.

8. That under the swamp land grant it was the duty of the Secretary to have approved its list of selections and to have issued patents therefor.

V. The plaintiff further claimed that under the act of Congress of September 28, 1850, the Secretary of the Interior having by general instructions to the surveyors-general and an agreement with the Governor of the State of Iowa, fixed upon a certain plan for ascertaining what lands came within the grant, and the State having upon its part conformed to those instructions and complied with the agreement in making and reporting its selections, and their sufficiency never having been questioned by the executive officers, they are not open to impeachment before the courts, for the following reasons:

206 1. All questions as to the extent of the grant and the manner of its administration are governed by the laws of the United States.

2. Under those laws the Secretary was authorized to make regulations for the management of the business of his Department.

3. By the act making the grant he was appointed to carry it into effect.

4. By such appointment his jurisdiction was exclusive and subject to review only upon principles applicable to all other special tribunals. That the decisions of such tribunals may be reviewed by the courts only:

1. Where the tribunal has erred in its construction or its application of the law.

2. In cases of fraud, accident, or mistake.

3. Where the adverse claimant has had no opportunity to contest the proceedings.

VI. The plaintiff further claimed that the defendant having placed its opposition to the application of plaintiff for an examination and certification of its list upon the sole ground that the lands had been previously certified as within the limits of the Dubuque & Pacific Railroad Company, or, as its counsel termed it, a want of jurisdiction, it cannot now change its grounds. The sole question which this court has jurisdiction to try is whether the Assistant Secretary decided that question correctly. If he did, the plaintiff must fail; if he did not, it is entitled to such judgment as he should have given upon the evidence before him.

The defendant is concluded as to every ground of contest open to it before the executive officers, and having refused to submit its claims to the Commissioner of the General Land Office, it is con-

cluded everywhere, unless the grounds there taken were sufficient in law to uphold the decision, which it procured to be made, upon its appeal.

If it might, as a defence to this action, have contested the
207 sufficiency of plaintiff's proofs at any time, it should have done so at the time of pleading and by setting up title in itself.

VII. The plaintiff further claimed

1. That parol evidence was not competant to contradict or impeach its proofs made before the Commissioner of the General Land Office, upon the grounds fully stated in the printed record at page one hundred and thirty-one.

The plaintiff further claimed that—

1. In all cases where title is derived fron the United States, the rights of the parties are to be determined solely by the laws of Congress.

2. That all questions relating to the construction of Congressional grants, or how they shall be carried into effect, are to be determined primarily by the officers of the Land Department of the Federal Government.

3. That their decisions are final upon all questions of fact, unless the party complaining can bring his case within some recognized head of equity jurisdiction.

4. That errors of law committed by them, affecting the rights of private parties, are subject to examination and correction by the courts.

5. That in the examination of such questions the courts will not receive original evidence in behalf of a party who has had an opportunity to give his evidence before the land officers, but will determine the case upon the evidence then given or offered.

6. That upon such hearing the courts will make such decision, and such only, as, under the laws of the United States, should have been made by the officer whose errors are sought to be corrected.

7. That in the administration of the business of the Executive Departments of the Federal Government, the regulations adopted by the heads of those departments have the force of laws unless inconsistent with some act of Congress.

8. That the grant under which plaintiff claims vested a
208 present title in the State, subject to the identification of the lands in the way provided by that act.

9. That the power vested in the Secretary was exclusive, and the means solely in his discretion.

10. That it was competent for him either by general regulations in the form of instructions to his subordinates, or by agreement with the States as the grantees named in the act, to adopt such method as he saw proper for ascertaining what lands were of the description contained in the grant.

11. That when such method was adopted by agreement it had all the force of a contract, and could be modified or rescinded only for

causes sufficient as between individuals, and upon the same principles.

12. That when the State made its survey and reported its selections and proofs, in accordance with the agreement and instructions of the Secretary it could not be prejudiced by any act of the latter or by his refusal to act. That such proofs could be impeached only for fraud or other cause sufficient as between individuals.

13. That they could be contested only by one having title in himself, and in the way provided by the regulations of the Department of the Interior.

14. That the acts of the Executive Officers of the Federal Government, within their respective jurisdictions provided by the laws of Congress, when they come before the courts for review, are to be examined upon the same principles and subject to the same limitations of power in the courts as the acts of other special tribunals.

15. That as to such acts the jurisdiction of the courts does not extend beyond the correction of the errors of law committed by the special tribunal, and in no case can they entertain jurisdiction, except at the suit of one who has exhausted his remedy before such tribunal, and in such case only to examine the grounds of his claim as there made.

209 VIII. The plaintiff further claimed upon the argument of the cause, as to defendant's claim of the title, as follows:

1. It sets up none in its answer.

2. The claim originally made has been determined against it upon demurrer.

3. It is not only without any title under which to contest plaintiff's rights, and estopped by its acts before the land officers, but its answer raises no issue in support of which such evidence, if otherwise admissible, would be competent.

IX. The plaintiff further claimed upon a petition filed for a rehearing, that it was admitted by the defendant that all of the lands awarded by the district court to the plaintiff were of the description named in the act of Congress of September 28, 1850.

X. The plaintiff further claimed upon its petition for a rehearing that there was no question before this court, and that there was none before the district court, except as to the lands claimed by defendant in its petition for a new trial in the district court.

XI. And the plaintiff further claimed that the patents issued by the Governor of Iowa to defendant were null and void.

And the decision of this court being against the title so claimed by the plaintiff and the said claim of title arising under the laws and statutes of the United States for the purpose of enabling the said plaintiff properly to present the same and its several claims before the Supreme Court of the United States upon writ of error, it is ordered and directed that the foregoing be certified by the chief justic of this court, and made a part of the records and decree in this cause, and the same is accordingly done.

AUSTIN ADAMS,
Chief Justice of the Supreme Court of Iowa.

Dated June 20, 1881.

To the Honorable Austin Adams, chief justice of the supreme court of the State of Iowa:

Now comes the county of Buena Vista, in the State of Iowa,
210 by Galusha Parsons, its attorney, and complains that in the record and proceedings, and also in the rendition of a decree in a suit wherein your petitioner, the said County of Buena Vista, was plaintiff, and the Iowa Falls and Sioux City Railroad Company was defendant, in the said supreme court of the State of Iowa, being the highest court of law or equity of the said State in which a decision could be had in the said suit, and in which a final decree was rendered at the June term of said court, 1881, against your petitioner, the said plaintiff, dismissing its said suit and petition upon the merits thereof, and your petitioner claims that there was manifest error in said decree and in dismissing its said suit, and now claims, as at all times it has claimed, that it was and is the true and equitable owner of said lands so claimed by it and described in its petition in said suit and of each and every part and parcel thereof, under the laws of the United States, to wit, an act of Congress approved September 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," to the great injury of the said plaintiff.

Wherefore it prays the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

GALUSHA PARSONS,
Attorney for The County of Buena Vista, the above-named Plaintiff and Petitioner.

Dated June 20, 1881.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of Iowa before you, being the highest court of law or equity of said State of Iowa, in which a decision could be had in said suit between The County of Buena Vista, in the State of Iowa,
211 plaintiff, and the Iowa Falls & Sioux City Railroad Company, defendant, was drawn in question the right and title of said plaintiff to certain lands claimed and specially set up by it under a statute of the United States, and the decision was against its said claim, and against the title so specially set up and claimed by it under the said statute of the United States and the authority exercised under said statute, a manifest error hath happened, to the great damage of said plaintiff, The County of Buena Vista, in the State of Iowa, as by its complaint appears, and the said plaintiff having prayed the allowance of a writ of error, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do com-

mand you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, the 28th day of June, 1881.

[SEAL.]

ED. R. MASON,
Clerk of the Circuit Court of the United States for the District of Iowa, Central Division.

Allowed this 28th day of June, 1881.

AUSTIN ADAMS,
Chief Justice of the Supreme Court of Iowa.

Filed July 2, 1881.

Supreme Court of the United States.

212 Know all men by these presents, that we, John S. Runnels and James S. Clarkson, both of the city of Des Moines, Iowa, are held and firmly bound unto the Iowa Falls and Sioux City Railroad Company in the sum of $500, to which payment we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Dated this 28th day of June, 1881.

The condition of the above obligation is such, that whereas The County of Buena Vista, in the State of Iowa, has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment or decree of the supreme court of the State of Iowa in an action wherein the said county of Buena Vista was plaintiff and the said Iowa Falls and Sioux City Railroad Company was defendant: Now, therefore, if the above-named plaintiff, The County of Buena Vista, shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JOHN S. RUNNELLS.
JAMES S. CLARKSON.

I approve the foregoing bond and of the sufficiency of the sureties therein named.

AUSTIN ADAMS,
Chief Justice of the Supreme Court of the State of Iowa.

Dated June 28, 1881. Filed July 2, 1881.

UNITED STATES OF AMERICA, *ss:*

To the Iowa Falls & Sioux City Railroad Company:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be held at Washington, on the second Monday of October, 1881, pursuant to a writ of error filed in the clerk's office of the supreme court of the State
213 of Iowa, wherein the county of Buena Vista, in the State of Iowa, is plaintiff, and you are defendant in error, to show cause why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 28th day of June, 1881.

AUSTIN ADAMS,
Chief Justice of the Supreme Court of Iowa.

Due service of the within citation is hereby accepted.

E. S. BAILEY,
G. S. ROBINSON,
Attorneys for the I. F. & S. C. R. R. Co., Defendant in Error.

June 29, 1881. Filed July 22, 1881.

Assignment of Errors.

[Title of the Cause.]

Comes now the said plaintiff in error, The County of Buena Vista, and says that in the record and proceedings aforesaid there is manifest error in this:

The said court erred in holding and deciding—

1. That the said plaintiff had not title to said lands under the act of Congress known as the swamp land grant.

2. That the said defendant could in any way contest said claim upon any other or different grounds than those upon which it contested the same before the land officers of the United States.

3. That it was incumbent upon the said plaintiff to give any other or further proof as to the character of said lands than that given by it, and its selections and the proceedings thereupon before the land officers of the United States.

4. In holding that under the issues now here there was any claim made by said defendant to any of said lands except those named in the list making part of its petition for a new trial.

214 5. In holding that the rights of the parties were not governed solely by the laws of Congress.

6. In holding that it was incumbent upon the State of Iowa, or the plaintiff as its grantee, to give any other or different proof as to the character of said lands, or the appointment of agents to select the same than such as was required by the Secretary of the Interior by the instructions given and the regulations made by him in respect thereto.

7. In holding that the Secretary of the Interior had any power to control or in any way to direct the Commissioner of the General Land Office in the performance of his duties under the act of Congress in respect to said lands, passed March 5, 1872.

8. In finding that it was shown by the evidence that 398 of said tracts were high and dry.

9. In holding that section 927 of the revision of Iowa had any application to this case, or that it was incumbent upon the plaintiff to prove that the persons making its selections were appointed by the county court.

10. In holding that there was any issue as to the character of the lands awarded to the plaintiff by the district court, and in holding that its lists and the action thereon by the land officers was not competent evidence of the character of said lands.

11. In holding that it was not shown that any of said lands were in fact swamp.

12. In holding that plaintiff's list was rejected by the Federal Land Officers.

13. In holding that defendant was not bound by the agreement between the State of Iowa and the Secretary of the Interior as to the manner in which the lands granted by the act of Congress of September 28, 1850, should be selected.

14. In holding that the defendant was not barred as to its claim of title by the ruling upon the demurrer to the second division of its answer.

15. In first holding that the entire case was before this court as to all of the lands, and second if so before the court in dis-
215 missing plaintiff's bill and rendering a decree upon the merits as to the lands not embraced in the list making part of defendant's petition for a new trial, and as to which the district court did not vacate the judgment or decree of June 6, 1877, and as to which plaintiff had neither been called upon nor had any opportunity to give evidence.

16. In holding that its jurisdiction extended beyond the correction of the errors, if any, committed by the Secretary of the Interior, and the granting of such relief as the plaintiff might be entitled to by reason of such correction.

17. In holding that the certification by the Secretary of the Interior under the railroad grant was in any sense an adjudication either of the rights of the parties or as to the character of the lands.

18. In holding that the patents of the Governor of Iowa were valid.

19. In holding that it was not both admitted by the answer and proved that plaintiff's list came into the possession of the Commissioner of the General Land Office, or that there was any issue in respect to said list, or the action which had been had thereupon.

20. In holding that upon the application by defendant for a new trial it was incumbent upon plaintiff to give any evidence in support of the judgment which it had already obtained, until defendant had given evidence showing that it had a defence, and the existence of sufficient grounds for vacating or modifying the same;

and in holding that the original judgment was in any manner before this court, except in so far as the district court had adjudged, or should have adjudged, upon the evidence before it upon defendant's petition to vacate said judgment, that there was a valid defence to the action.

21. In holding that the said judgment and the plaintiff's title to said lands under the said acts of Congress, and as established by said judgment, were in any way before this court upon defend-
216 ant's appeal, and in dismissing plaintiff's suit, and in rendering a final decree against it upon the merits and against the validity of its title without any evidence given by defendant in respect to the character of said lands, except as to the tracts described in its petition for a new trial; and in holding that it was incumbent upon plaintiff, upon this petition by defendant for a new trial, to prove its title to the lands not claimed by defendant in said petition, or in respect to the tracts embraced in the decree of June 6, 1877, as to which defendant had given no evidence.

Wherefore the said county of Buena Vista prays that the judgment and decree aforesaid be reversed and altogether held for naught.

GALUSHA PARSONS,
Attorney for Plaintiff in Error.

I, E. J. Holmes, clerk of the supreme court of the State of Iowa, hereby certify the foregoing to be true copies of the records and proceedings in the case of The County of Buena Vista, in the State of Iowa, plaintiff, and The Iowa Falls and Sioux City Railroad Company, defendant, as fully and complete as the same appear on file and of record in my office, and that said bond, citation, and writ of error were filed in my office at the dates thereon endorsed; and I further certify that the annexed is a true copy of the opinion of the said supreme court filed in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court, this 10th day of August, A. D. 1881.

[SEAL.] E. J. HOLMES,
Clerk of the Supreme Court of the State of Iowa.

Appeal from Buena Vista District Court. Filed December 11, 1880.

COUNTY OF BUENA VISTA *vs.* I. F. & S. C. R. R. Co.

This action was commenced in equity on the second day of October, 1876, to establish the plaintiff's claim to certain alleged
217 swamp lands, in the petition described. The relief asked by the plaintiff was granted as to part of the land in controversy, and denied as to the residue. Both parties appeal. The facts are stated in the opinion.

Galusha Parsons, for plaintiff; G. S. Robinson and E. S. Bailey, for defendant.

DAY, J.:

The plaintiff in its petition claims to be the owner in fee-simple of the lands in dispute, under the swamp-land grant of September 28, 1850; that each parcel thereof was of the description specified by said act of Congress, and was duly selected as such; that the Secretary of the Interior refused to take up, examine, and allow the list, and such refusal was wholly by reason of defendant's resistance; that the commissioner decided to allow said lists, but the Secretary of the Interior, on appeal, reversed said decision, and directed him to go no further; that the said lands were, without authority, on the fifth of July and the tenth of August, 1871, patented by the Governor of Iowa to the defendant, and the patents are recorded in the office of the recorder of deeds for the county of Buena Vista. The plaintiff asks for a decree quieting and establishing the title in itself, declaring the said patents void, and that the defendant holds the title in trust for plaintiff, and requiring the defendant to account for the moneys received from sales of said land. The defendant, in the first division of its answer, admits the issuance of the patents, and that it claims said lands, and denies all other allegations of the petition.

In the second division of its answer, the defendant sets out the acts of Congress and of the Legislature of Iowa conferring lands upon the defendant, and the acts and proceedings thereunder, and the issuance of the patents to the defendant in pursuance thereof, and that the county had for several years levied and collected taxes on said lands of defendant, and is thereby estopped from claiming the same. The plaintiff demurred to the second division of the defendant's answer, and the demurrer was, in the court
218 below, sustained. From the order sustaining the demurrer the defendant appealed to this court, in which the judgment of the court below was affirmed, solely upon the ground that the facts alleged in the seventh paragraph of the answer, to wit, the levy and collection of taxes, did not estop the county from claiming title to the lands. See 46 Iowa, 226.

At the June term, 1877, of the district court, no one appearing for the defendant, judgment was rendered in favor of plaintiff for all the lands claimed, and for about $20,000 in money. On the seventeenth day of July, 1877, the defendant filed a petition for a new trial, accompanied with exhibits and affidavits. The plaintiff demurred to this petition, and the court sustained the demurrer, with leave to the defendant to amend the petition. Thereupon the defendant filed an amended petition and application for a new trial, to which also the plaintiff demurred. The court sustained this demurrer, upon the ground that the granting of a new trial is not within the discretion of the court, but is governed by title 19 of the code. On appeal to this court the order sustaining the demurrer was reversed. 49 Iowa, 657.

On the twenty-first day of May term, 1879, the plaintiff filed an answer to the petition and application for a new trial, denying several of its material allegations, and setting forth affirmatively

the facts under which plaintiff claims its title to the lands. On the same day the defendant moved the court to strike this answer from the files, and to enter an order for a new trial. The court sustained this motion, and ordered a new trial upon the defendant paying to plaintiff the sum of $250 as attorney's fees upon the first trial, and the cost of such trial. From this order the plaintiff thereupon immediately appealed to this court. Thereupon the plaintiff moved the court for leave to controvert the allegations of the defendant's petition for a new trial by affidavits, depositions, or oral testimony, or in any way the court may designate. This motion was denied, and the plaintiff excepted. Afterwards, on the same day, the defendant brought into open court the sums ordered to be paid as aforesaid, and the clerk paid to Galusha Parsons, the attorney of plaintiff, the said sum of $250, and took his receipt
219 therefor. The defendant thereupon filed an additional and supplemental answer, alleging the levy and collection of taxes upon said lands by plaintiff, and the payment thereof by the defendant; that the lands were patented to defendant, and claimed by it, under the several acts of Congress and of the Legislature; and asking that if any of said lands are adjudged to plaintiff that the taxes on them be refunded, with interest. The cause was tried to the court, and a decree was entered quieting in the plaintiff the title to a part of the lands, and awarding to the defendant the taxes paid thereon, with interest at 6 per cent.

1. It is claimed by the plaintiff that the application was improperly granted. Most of the positions assumed by the plaintiff were determined adversely to it on the former appeal. 49 Iowa, 657. The only position of the plaintiff which requires notice is that the plaintiff should be allowed to answer the petition or application for a new trial, and have a trial of the issue thus raised.

First. Upon the former appeal it was held that the proceedings instituted by plaintiff is within the contemplation of the last four sections of chapter 2, title 20, of the Code, and that the defendant's application for a new trial falls under the provisions of section 3268 of the Code. This section authorizes the court, in its discretion, upon the application of a party made at any time within a year from the former trial to grant a new trial, although the grounds required for a new trial in other cases be not shown. The section does not seem to contemplate any notice to or defense by the other party, for section 3269 provides that if the application for a new trial is made after the close of the term at which the judgment was rendered, the party obtaining a new trial shall give the opposite party 10 days' notice thereof before the term at which the action stands for trial—a proceeding altogether unnecessary and unmeaning, if the party is allowed to take issue upon and defend against the application.

Second. The amount of money which the defendant was required to pay as the condition of being allowed a new trial was paid
220 over to the plaintiff's attorney, and by him receipted for. The plaintiff cannot accept the benefits of the judgment, so far as favorable to it, and at the same time prosecute an appeal from the

judgment. Ind. Dist. of Altoona *vs.* The Dist. Town. of Delaware, 43 Iowa, 201.

2. The defendant claims the land in controversy under an act of Congress, approved May 15, 1855, making a grant of lands to the State of Iowa in alternate sections to aid in the construction of certain railroads in the State, and certain acts of the General Assembly of the State of Iowa. On the twenty-third day of December, 1858, the Commissioner of the General Land Office certified all the lands in controversy as enuring to the State of Iowa under said grant of May 15, 1856. On the twenty-seventh day of December, 1858, this certification was duly approved by the Secretary of the Interior. On the fifth day of August, 1871, Samuel Merrill, Governor of the State of Iowa, patented a portion of the lands in controversy to the defendant, and on the tenth day of August, 1871, the said Governor of Iowa patented the remainder of said lands to the defendant. By the certification of the Commissioner of the General Land Office, the approval of the Secretary of the Interior, and the patents of the Governor of Iowa, the legal title to all the lands in dispute has become vested in the defendant. This legal title the plaintiff seeks to have set aside and vested in itself.

The plaintiff claims the lands in controversy under an act of Congress, approved September 28, 1850, to enable the State of Arkansas and other States to reclaim the swamp lands within their limits, and an act of the General Assembly of the State of Iowa, passed January 13, 1853 (Revision, § 925), granting to the counties, respectively, in which they may lie, all the swamp lands granted to the State of Iowa by the act of Congress, approved September 28, 1850. The act of Congress of September 28, 1850, grants to the States in which they are situated the whole of those swamp or overflowed lands made unfit thereby for cultivation which shall remain unsold at the passage of the act. It requires the Secretary of the Interior to make out an accurate list and plats of the lands described, and at the re-
221 quest of the Governor of the State to cause a patent to be issued to the State therefor, which shall vest the fee-simple in the State, subject to the disposal of the Legislature thereof. It provides that in making out said lists and plats all legal subdivisions, the greater part of which is wet and unfit for cultivation, shall be included, but when the greater part of a subdivision is not of that character, the whole of it shall be excluded. The Commissioner of the General Land Office, on the twenty-first day of November, 1850, directed the making out of the lists prescribed, and furnished instructions to the surveyor general at Dubuque, as follows: "You will please make out a list of all the lands thus granted to the State, designating those which have been sold or otherwise disposed of since the passage of the law, and the price paid for them when purchased. The only reliable data in your possession from which these lists can be made out are the notes of the surveys on file in your office, and if the authorities of the State are willing to adopt these as the basis of those lists, you will so regard them. If not, and those authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will so report them.

The State of Iowa was not willing to accept the notes of the surveys on file in the surveyor general's office, and on January 13, 1853, passed an act authorizing the county courts of the respective counties to appoint some suitable person to examine the lands, and make due report and plats, upon which the topography of the county should be carefully noted, to said courts, which were required to transmit to the proper officers lists of all of said swamp lands, in order to procure a proper recognition of the same on the part of the United States. Revision, § 927. On the eighth day of November, 1853, the surveyor general directed a communication to the Secretary of the State of Iowa, urgently requesting his active co-operation in closing up the swamp-land business, and accompanying it a form of proof to be employed by the agent of the county and returned to that office for approval. On the twenty-fifth of January, 1855, the General Assembly passed an act authorizing the Governor to
222 adopt such measures as to him might seem expedient to provide for the selection of the swamp lands of the State, and to secure the title therefor. Revision, § 955. After the passage of this act the attention of the county judges was repeatedly called to this subject by the Governors of the State, and they were urged to make the proof necessary to entitle them to the lands.

The petition alleges that each and every parcel of the lands in controversy was at the date of the passage of said act of the description specified therein; that in 1859 the plaintiff caused a list of said lands to be made in accordance with the act of Congress and the rules and regulations of the General Land Office of the United States, but has not been able to have the sufficiency thereof examined, passed upon, and approved. Under the issue presented it is clearly incumbent upon the plaintiff, in order to the recovery of any 40-acre tract in controversy, to prove that the greater part of it was on the twenty-eighth day of September, 1850, wet and unfit for cultivation. To prove the swampy character of the lands in question the plaintiff introduced a list of swamp and overflowed lands situated in the county of Buena Vista, embracing the lands in controversy, and recorded in the office of the register of the State land office of Iowa. This list is verified by the affidavits of G. S. Ringland, W. H. Hait, and Zachariah Tucker, who assert in their affidavits that they were appointed by the county judge of Buena Vista county to select the swamp and overflowed lands in said county; that they understand and have examined the lines bounding each of the tracts designated in the list; and that the greater part of each and every 40-acre tract or smallest legal subdivision is swamp and overflowed land, and of the character embraced in the act of Congress approved September 28, 1850.

Attached to this list is the affidavit of J. W. Tucker, as follows: "I, J. W. Tucker, late county judge of Buena Vista county, in the State of Iowa, do solemnly swear that George S. Ringland, Zachariah Tucker, and W. H. Hait were duly appointed by me, while
223 county judge of said county of Buena Vista, as agents to select the swamp and overflowed lands in Buena Vista county aforesaid, and that the agents aforesaid are reliable and responsible

men; and I do further swear that the within is the original report of said agents, and that the correctness of the report has been sworn to by said agents, as will more fully appear by the affidavits hereto attached. The reason that I do not certify said report is that since employing said agents I have moved from the county of Buena Vista to the county of Black Hawk, in said State." The jurat to this affidavit is dated December 26, 1859. This testimony was admitted, against the objection of the defendant as to its competency, and it is now insisted that it is both incompetent and insufficient to establish the swampy character of the lands in question. We think the evidence incompetent upon several grounds.

Section 929 of the revision requires that the agent shall be appointed by the county court at a regular term thereof. The proper evidence of the appointment is the production of the record of the county court. If no record was made, or it has been lost, the written appointment of the agent should be produced. If that is not available, and parol evidence of the fact is proper, the evidence should be the testimony of witnesses subject to cross-examination, and not the mere *ex-parte* affidavit of the person making the appointment.

This section does not provide that the lists so made shall be evidence of any fact. They are authorized to be made merely for the purpose of procuring the proper recognition of the same on the part of the United States, and are in the nature of a claim or demand. The lists are required to be transmitted by the county court to the proper officers for approval. The regulations and instructions of the Department show that this person is the surveyor general. There is no proof that the list in question was ever transmitted to the surveyor general, or that he ever had any opportunity of passing upon it. It is not shown that this list ever came into the possession of the Commissioner of the General Land Office or of the Secretary of the Interior, or that its correctness or validity was at any time
224 recognized by any department of the Government. It is true the surveyor general, under instructions from the department of the Government, submitted forms of proof; but his instructions required that the proofs made should be transmitted to his office for approval, and to aid him in making up the lists of lands embraced in the grant, which is not shown by the evidence to have been done. So far as the evidence shows, the list constitutes no more than the claim of Buena Vista county, which has never been recognized, approved, or allowed by any department of the Government. That it is exceedingly inaccurate and unreliable is evidenced by the fact that, while it embraces 551 tracts, the defendant established affirmatively and satisfactorily that 398 of them were high and dry, and fit for cultivation.

The evidence falls very far short of what was held sufficient *prima facie* evidence of the swampy character of the lands in Page Co. *vs.* B. & M. R. R. Co., 40 Iowa, 522. In that case the lists prepared under the authority of the county were transmitted to the surveyor general, and by him forwarded to the General Land Office. It was regarded by the proper department of the General Government as

the list and selection of lands for Page county, and the lands therein were withdrawn from sale at the proper United States land offices.

The case of Clarkson *vs.* Buchanan, 43 Mo., 563, cited and relied upon by plaintiff, is not in point. A statute of the State of Missouri, p. 868, § 9, provides that lists and plats of swamp lands received from the Government of the United States shall by the Governor be caused to be filed in the office of the register of lands, and shall be received by all courts of the State as *prima facie* evidence of title. A certified copy of the list of swamp lands on file in the office of the register was offered in evidence, and it was held that the presumption was that the list was legally and correctly there. In this case it is shown affirmatively that the proper departments of the United States refused to recognize or approve the lists prepared by the county. There cannot, therefore, be any presumption exercised in their favor. Besides, in Clarkson *vs.* Buchanan the lists
225 were not offered or accepted to prove that the lands were wet and subject to overflow. That fact was proved by independent testimony produced at the trial. None of the authorities cited by the plaintiff, as we understand them, sustain the sufficiency of the lists in question to establish the swampy character of the land.

As the plaintiff failed to prove by competent and sufficient testimony that any of the lands in question are swamp, and fall within the terms of the grant of September 28, 1850, the petition should have been dismissed.

On plaintiff's appeal affirmed. On defendant's appeal the decree is reversed.

Endorsed on cover: Iowa sup. court. No. 57. The County of Buena Vista, in the State of Iowa, plaintiff in error, *vs.* The Iowa Falls & Sioux City Railroad Company. Filed October 8, 1881.

112-165

Office Supreme Court U. S.
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OCT 23 1884
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 57.

THE COUNTY OF BUENA VISTA, IN THE STATE OF IOWA, PLAINTIFF IN ERROR,

vs.

THE IOWA FALLS & SIOUX CITY RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

GALUSHA PARSONS,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 57.

THE COUNTY OF BUENA VISTA, IN THE STATE OF IOWA, PLAINTIFF IN ERROR,

vs.

THE IOWA FALLS & SIOUX CITY RAILROAD COMPANY, DEFENDANT IN ERROR.

Writ of Error to the Supreme Court of Iowa.

BRIEF FOR PLAINTIFF IN ERROR.

This action was brought by the plaintiff in error to establish its title to *five hundred and fifty-three* forty-acre tracts of land, lying within its limits and claimed by it under the act of Congress of September 28th, 1850, known as the swamp land grant.

The case has been three times before the supreme court of Iowa; first, 46 Iowa, 226, upon defendant's appeal from an order sustaining a demurrer to the second division of its answer, (Trans., page 4 to 6). The court held plaintiff was not estopped by reason of having received taxes upon the lands; second, 49 Iowa, 657, upon defendant's appeal from an order denying its application for a new trial, the supreme court reversed the order of the district court; third, 55 Iowa,

157, upon appeal by both parties from the decree now here, by which the district court modified its judgment previously rendered. (Trans., page 125–129.)

The act of Congress, under which plaintiff claims, is printed in the record at page 58. The grant by the State to the counties is as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Iowa,* That all the swamp and overflowed lands granted to the State of Iowa by the act of Congress entitled "an act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September twenty-eighth, 1850, be, and the same are hereby granted to the counties respectively in which the same may lie, or be situated, for the purpose of constructing the necessary levees and drains, to reclaim the same; and the balance of said lands, if any there be after the same are reclaimed as aforesaid, shall be applied to the building of roads and bridges, when necessary, through or across said lands, and if not needed for this purpose to be expended in building roads and bridges within the county. Passed January 23, 1851, Rev. (1860), Sec. 925."

The defendant claims under the railroad grant to Iowa, May 15th, 1856, printed in the record at page 83. The grant from the State to it is also printed in the record at page 85. Under this last act the Governor of Iowa had issued patents to defendant, but without knowing that the lands had been selected as swamp. (Trans., p. 123, 124.) The prayer of the bill is to set aside these patents, and to quiet plaintiff's title.

The ultimate facts, which I suppose to be either admitted or proved by evidence that is undisputed, are these:

1. The grant to the plaintiff, as hereinbefore stated, of the swamp lands within its limits.

2. An agreement by the State and Federal officers that they should be selected by agents appointed by the former.

There was no formal agreement in terms, but the officers,

State and Federal, have construed their correspondence as an agreement and have always recognized and acted upon it as such.

1. Instructions of Commissioner, Trans., p. 58. Forms attached, *Id.*, 73.
2. Letter of Commissioner, *Id.*, 33–4.
3. Decision of Commissioner, *Id.*, 47.
4. Forms of proof furnished State officers by Surveyor General, *Id.*, p. 73.

And the correspondence throughout the record.

Originally the county judges of the different counties had charge of the matter, but afterwards the whole matter was placed in charge of the Governor by the following act:

"SEC. 3. That the Governor is hereby authorized to adopt such measures as to him may seem expedient to provide for the selection of the swamp lands of this State and to secure to the State the title to the same, and also for the selection, in the name of the State, of other lands, in lieu of such swamp lands, as may have been or may hereafter be entered with warrants: *Provided*, That the provisions of this act shall not be construed to apply to any swamp lands which have already been selected by any organized county of this State under the provisions of any previous law: *And provided further*, That this act shall not be construed to impair the rights of the counties of this State to any swamp lands within said counties under the provisions of any law in force in relatian to the same, and that the selections made by the organized counties shall be reported by the Governor to the authorities at Washington."

Rev., sec. 955. *Id.*, p. 61.

At different times circulars were issued to the county judges requesting them to appoint agents to make the selections. (Trans. 65, 66.)

This county was organized in 1859, and the selections made in that year, *Ib.* 30,130. These selections and the list, with its proofs, were delivered to the surveyor general, but they were

not *filed* by him in the General Land Office, but rejected *because the lands were not both swamp and overflowed.* His office was abolished in 1866, and this list was *found* in his office when it was abolished, and removed with the other archives of the office by the Commissioner to Washington. When found the list was marked upon the cover in these words:

"*Rejected for want of conformity to Commissioner's instructions of 13th of July*, 1860." (Trans., p. 34).

Instructions, *id.*, p. 77; overruled by Secretary, *id.*, p. 77, 8.

These instructions were to the effect that no lands came within the grant except such as were both swamp and overflowed. This ruling of the Commissioner was reversed by the Secretary, Sept. 15, 1860. This list so removed and many other lists remained in the General Land Office unacted upon until 1866, when the General Assembly, by special act, appointed Josiah A. Harvey, the then register of the State land office, a commissioner to procure a settlement of the swamp land and other grants. So much of this act as relates to the authority given him in respect to these lands, is as follows:

"Whereas, The claims of the State against the United States, arising under the swamp land grant, remain to a very great extent in an unsettled and unsatisfactory condition; and

"Whereas, The interests of the State and her grantees demand a speedy settlement of all said matters; therefore

"SEC. 1. *Be it enacted by the General Assembly of the State of Iowa*, That Josiah A. Harvey, register of the State land office be and he, is hereby, appointed a commissioner on behalf of the State of Iowa, to adjust with the General Government all the matters and claims aforesaid.

"SEC. 2. Said commissioner shall proceed to Washington city and present said claim to the Department of the Interior and urge the same to settlement as early and as speedily as may be consistent with the interest of the State. (Laws of 1866, chap. 79.)"

He made a test case of this list—Trans., p. 33—and ap-

plied to the Commissioner, Mr. Wilson, to take it up for action, *id.*, p. 34. The Commissioner declined to take it up for the reason that it had not been *regularly reported by the surveyor general.* (Trans., p. 45.)

Upon appeal to the Secretary he affirmed this decision, giving as his *reasons* for doing so that the first session of the Legislature of the State of Iowa, after the passage of the act of March 12, 1860, adjourned on the 8th day of April, 1862. *There is no proof that the list of selections* made by the said county *was filed in the office* of the surveyor general within two years from the time of said adjournment, and for *that reason* I affirm the decision made by the Commissioner. (Trans., p. 42.)

Mr. Harvey thereupon asked leave to furnish the proofs, which the Secretary declined to give. (*Id.*, 43, 44.)

He then prepared and procured the passage of a bill requiring the *Commissioner*, by his name of office, to take up and allow or disallow this and other lists similarly situated. The bill was passed and approved March 5, 1872. (*Id.*, pp. 44, 76.)

The application of the Governor of the State of Iowa, that this list be taken up under this act. (Trans., p. 44.)

The decision of the Commissioner upon this application, July 7, 1875.

Its material portions, after stating the history of the matter, are, that in Iowa the State undertook the selection of the lands and the presentation of proof of its swampy character to the surveyor general, the ultimate determination of the matter being reserved to the Interior Department. *The State has long since claimed the lands as swamp lands, and furnished prima facie evidence that they are of that character*, and he held that it became his duty, under the above act, to take up and act upon this list. As to the certification under the railroad grant he said:

"The act provides that the Commissioner shall examine certain selections and allow or disallow, according to the

acts of Congress in force touching the same at the time such selections were made, without prejudice to legal entries or the rights of *bona fide* settlers, under the homestead and pre-emption laws of the United States, prior to the date of said act. It has been claimed by some that a certification for the use of a railroad company *is a legal entry* within the meaning of that act. I do not think so. Such certification is a mere identification of such lands as were within the prescribed limits. An entry means a purchase with money or a location under or by virtue of some kind of warrant or scrip."

He decided to take up and act upon the list. (Trans., p. 45–48.)

From this decision this defendant, with others, appealed, stating as its grounds of appeal that the Commissioner had no *jurisdiction* to review the action of the Secretary in certifying the lands to the State, or to the railway company, under the land-grant acts of May 15, 1856, or of June 2, 1864, and that the entire subject-matter of the proceedings as far as the same concerned certified lands, had been disposed of by the Department. (*Id.*, p. 49.)

Upon the 21st of August, 1876, the Acting Secretary *directed the Commissioner* to take no further proceedings in the matter, stating as his reasons for doing so—

1. That as the lands had been certified under the railroad grant of May 15, 1856, and as the railroad company had mortgaged them, and they had been taxed, the State was *estopped* from claiming them under the swamp land grant.

[No such question was raised by the railroad company or by the appeal, and it does not appear that there was any evidence before him or the Commissioner upon that subject.]

2. That as they had been certified under the railroad grant the State should be left to assert its rights in the courts without the aid of the Department.

3. That a certification under the railroad grant was an ENTRY within the meaning of the act of March 5, 1872, and,

therefore, that act imposed no duty upon the Commissioner as to these lands. (*Id.*, 49–59.)

Upon being notified by the Commissioner of this decision (*id.*, 81–83) plaintiff commenced this action upon the idea that plaintiff having exhausted its remedy before the special tribunal primarily having jurisdiction of the matter, it was competent for a court of equity to grant it such relief as it was entitled to upon the evidence given by it before the land officers, and that the defendant having been notified that it could give evidence, if it desired to do so, unless it could bring itself within some head of equitable jurisdiction would be confined to the grounds of contest there made by it

THE ISSUES AND HOW THEY WERE MADE UP.

There are two sets of pleadings in the case, *scattered here and there* through the record, the judgment now here having been rendered upon defendant's application to vacate a judgment which had been taken against it upon its failing or declining to appear, and the issues finally tried were joined upon that application.

Orig. Judgment, Tr., p. 6.
Judgment appealed from, Tr., p. 125.

So far as material to this question that judgment was as follows:

This cause having been fully submitted to the court, and the court being fully advised in the premises, *finds and adjudges that the judgment and decree heretofore—to wit, on the sixth day of June, A. D.* 1877—*rendered in this cause by this court was erroneous, and should be modified, vacated, and set aside, as hereinafter directed.* * * * Therefore it is considered, adjudged, and decreed by the court that the judgment and decree heretofore—to wit, on the 6th day of June, A. D. 1877—by this court in this cause made, *be, and the same is hereby, set aside*, vacated, and declared to be null and void and of no effect, *except* as to the lands hereinafter awarded to the plaintiff, and that as to *said* lands the same be *affirmed as herein modified*. (Trans., p. 125.)

The statutory proceedings in Iowa for obtaining new trials after the term, so far as material to this case, are these:

Code, section 3154, *et seq.*: "The proceedings shall be by petition, verified by affidavit setting forth the judgment or order, *the facts or errors constituting a cause to vacate or modify it, and the facts constituting a defense to the action* if the party applying was a defendant. * * * Defendant shall introduce no new cause, *and the cause of the petition shall alone be tried.*

"Sec. 3159. The judgment shall not be vacated on motion or petition until it is *adjudged* that there *is a valid defense* to the action in which the judgment is rendered. * * *

"Sec. 3160. The court may first try and decide upon the grounds to vacate or modify a judgment or order before trying or deciding upon the validity of the defense or cause of action."

To determine what the issues upon the trial of which this judgment was rendered were, it will be necessary to ascertain what the original issues were, which of them remained; what new issues were made upon the application to vacate the judgment, and how far they modified the original issues, and finally, as a question of law, whether anything was to be tried upon this application, but the issues then made, or in the language of the statute *the cause of the petition.*

The original petition alleges:

1. The grant to the State.

2. The grant by the State to the several counties. (Trans., p. 58–60.)

3. That the lands were, at the date of the passage of the act of Congress of the character described in that act.

4. That in accordance with the requirements of the act and the rules of the General Land Office, it had, in the year 1859, presented the proofs required by the land officers of the General Government; that the lands were of that de-

scription; that its selections were filed with the surveyor general and afterwards at Washington.

5. That from time to time it applied to the Commissioner of the General Land Office to take up its list for examination and allowance; that the defendant appeared before him and resisted its application, and that his refusal to take up the list was wholly because of such resistance. *That upon the 7th day of July*, 1875, *he did take it up and decided to allow it*; that the defendant appealed, and that upon the 30th day of August, 1876, the Secretary of the Interior *directed him to take no further proceedings in the matter.*

The answer to this petition begins at page 3 of the transcript. Its first division consists of certain denials in effect; a denial of plaintiff's right to the lands. By the second, it sets up the railroad grant of May 15th, 1856, and its claim of title under that grant, *but it does not in that division deny that the lands were of the description alleged in the petition.*

By statute in Iowa—Code, section 2657—each affirmative defense must be stated in a distinct division of the answer, *and must be sufficient in itself.* In addition to this, in equitable actions the answer must be separated into *paragraphs* and numbered. (Code, section 2660.)

To this second division plaintiff filed a general demurrer. (Trans., p. 6,) which was *sustained.* By statute (Code, section 2654,) it is provided that upon the decision of a demurrer, if the unsuccessful party fail to amend or plead over the same, consequences shall ensue as though a verdict had passed against the plaintiff, or the defendant had made default, and it is further declared (section 2867) that when the defendant makes default judgment shall be rendered against him, and it has been for many years settled—Harrison *vs.* Kramer, 3 Iowa, 543, and numerous cases since—that when the averments are sufficiently certain, plaintiff's case stands admitted. The defendant appealed from the decision upon

the demurrer, and the decision was affirmed by the Supreme Court. (Trans., p. 6.)

The plaintiff had annexed to its petition, among others, the following interrogatory:

"II. Did the defendant by its attorney appear before the Commissioner of the General Land Office of the United States, or the Secretary of the Interior, at any time, and oppose the application made to said officers, or either of them, to take up for examination the list of lands filed in the Department of the Interior on behalf of this plaintiff? If so, when and by whom, and did said attorney file an argument before said officers, or either of them, in behalf of the defendant and in opposition to said application?" (Trans., p. 3.)

The defendant answered as follows:

"Answering the second interrogatory, this defendant says that it did resist before the Commissioner of the General Land Office and the Secretary of the Interior, what it understood to be an application made by the State of Iowa; that said Commissioner should take up and examine the lands certified to the State of Iowa, under the act of Congress, approved May 15, 1856, to determine whether said lands, or any portion thereof, were swamp lands within the meaning of the act of Congress, approved September 28, 1850. And it did for that purpose appear by its attorney, W. F. Steiger, before both said Commissioner and said Secretary, and filed arguments therein. But this defendant did not understand or know that the application was to take up, for examination, lists of lands filed on the part of plaintiff, but understood it as hereinbefore shown." (Trans., pp. 5, 6.)

At the time judgment was taken the issues stood in this form, the affirmative division of defendant's answer demurred to, and the demurrer sustained; its denials only remaining.

The defendant's petition to vacate the judgment set out, first, its excuse for failing to appear, that its attorney who was present when the judgment was taken did not know the ex-

tent of his retainer, and, therefore, made no appearance, and that the other did not know when court began, and, therefore, was not there. (Tr., p. 8, 9.) That defendant was engaged in surveying the lands, and that it was its purpose to have appeared *and asked for a continuance.*

To this petition the plaintiff demurred, assigning very many grounds, most of which are of no importance here, but among them that it showed no sufficient excuse for defendant's failure to appear; and further—

"It does not state any facts showing that said petitioner has any defense to said action or title to the said lands, *or what lands it claims*, or what claim it makes, or what defense it claims to have to said action." (Trans., p. 13.)

The court sustained the demurrer and the defendant amended its petition, among other things, as follows:

"That, in fact, a great portion of said lands, including nearly all that portion sold by said defendant, were not and never had been swamp or overflowed lands, or lands unfit for cultivation; that a portion of said lands were among the driest and best portions of said Buena Vista county, and a large portion never were swamp or overflown within the meaning or intent of the act of Congress of September 28, 1850, and were the absolute property of this defendant. That defendant appeared and defended in said action in good faith at the November term, 1876, and at all times *intended to show the true character of said lands in dispute;* that the survey of said lands by said Regan was completed in July, 1877, AND A TRUE LIST OF THE DRY LANDS OF THE LANDS IN DISPUTE, TOGETHER WITH THE AFFIDAVIT OF THE SURVEY IN RESPECT THERETO IS HERETO ATTACHED, MARKED 'D,' AND MADE A PART HEREOF; that said defendant could have shown after said survey, and can now show, if permitted to defend, *that all of said lands in said list* are not and never were swamp and overflowed within the meaning of the act of Congress of September 28, 1850." (Trans., p. 18.)

The list referred to as Exhibit "D" is printed at page one hundred and forty-four of the transcript.

It describes two hundred and four tracts, one hundred and eighty-five of which are claimed in plaintiff's petition, and nineteen—by mistake I suppose—which are neither described in the petition nor claimed by plaintiff.

The defendant filed with this petition the deposition of James Vandeventer, its vice-president, who had charge of the lands and of its litigation, in which he states that he employed Mr. Kidder and Mr. Robinson to take full charge of the suit, and that their employment was by letter, making the letters a part of his deposition. In his letter to Mr. Robinson, after informing him that he had written to Mr. Kidder, he said—*with whom I would like to have you associated in looking after our interests in the suit which probably will not end short of the Supreme Court of the United States.* (Trans., pp. 23–26. Letters 25, 26.)

To this petition a demurrer was filed, which was sustained by the district court, but was overruled upon appeal to the Supreme Court. Upon the case being remanded to the district court for further proceedings, the plaintiff filed an answer to the petition setting up that Mr. Kidder was informed by plaintiff's attorney, both orally and by letter, when court would begin; that when the cause was reached for trial Mr. Robinson was in court, and was asked both by plaintiff's attorney and the court whether he desired any delay in the case, that he replied that he expected Mr. Kidder, and did not know why he was not present, that he had heard nothing from him, and that he did not wish to appear, but preferred leaving the case "so that we can take our own course hereafter;" that Mr. Parsons, plaintiff's attorney, then said to him, "I will take judgment, as I desire to leave, and will ask the court that it shall not be entered of record until the close of the term, and if Mr. Kidder comes and you desire to give any evidence it may be taken and considered with the case;" that Mr. Robinson in no way intimated that he was not fully authorized to take charge of the case, or that defendant desired a postponement, or was not fully ready for

trial, or that its attorneys had intended applying for a continuance.

It further answered and set out all of the proceedings which had been had under both the original swamp land grant and the act of 1872, notice by the Commissioner to defendant that it could give evidence if it desired to, that it declined to give evidence, its appeal, and the grounds of appeal. (Id., 27–29.)

The answer further averred that defendant's claim of title had been adjudged against it upon demurrer to the second division of its answer. This answer was on defendant's motion stricken from the files, (Tr., p. 51,) but the same was afterwards filed as a *reply*, and as such, with the exception of the first division, was allowed to stand. (Id., p. 54, 55.)

Plaintiff was refused the right in any way to controvert defendant's petition for a new trial. (Id., p. 52.)

The court then ordered a new trial, *but did not vacate the judgment* previously rendered.

I. Defendant filed what it called a *supplemental* answer—(Trans., p. 53)—alleging:

1. That the land had been taxed and the taxes paid from 1872 to the time of filing this answer, namely, 1878.

2. That the governor had issued patents to defendant in 1871, under the railroad grant, being the patents referred to in plaintiff's original petition, and in this division of the answer it is further alleged: *First*, That it did not know the character of the lands, as to being swampy or otherwise, until June, 1877, when it caused them to be surveyed; that a large portion of them were fit for cultivation, "*but that some portions or tracts thereof, but this defendant cannot now state with exactness and certainty what particular portions and tracts, are wet and overflowed;*" and, *Second*, That those lands were not subject to taxation, and asked that as to them the taxes be refunded.

The plaintiff replied not simply to this supplemental answer, but to the *entire* answer remaining in the case after the demurrer was sustained to the second division of the original answer by setting up the matters above stated which it had previously filed as an answer to defendant's petition for a new trial. Printed as an answer (Tr., p. 26), and with the exhibits annexed extending to p. 51. Filed as a reply, p. 54.

The plaintiff then amended its petition:

1. By making its list and proofs, and all of the exhibits annexed to its reply a part of it. Also a notice by the Commissioner to Mr. Vandeventer that defendant could give evidence.

"2. By alleging that its list was on file in the Commissioner's office at the time of its application to have it taken up, and then and there inspected by Mr. Vandeventer. (Tr., p. 55–56.) To this defendant answered, admitting the notice to Mr. Vandeventer, that it appeared and appealed, and the grounds of appeal, *id.*, p. 57. Notice of appeal 49, and further, in these words:

"And defendant further says that of the truth of no allegation in said petition as amended, or in the amendment to said petition, *not herein or in the original answer* to plaintiff's petition, *answered, admitted or denied, has this defendant knowledge or information sufficient to form a belief.*" (Tr., p. 83.)

This answer was verified by Mr. Vandeventer, the person whom, with others, the petition alleged to have been present at plaintiff's application to the Commissioner to have its list taken up, and *who had then and there inspected the list and made no opposition to* the sufficiency of its proofs, and that he had charge of defendant's lands and litigation. He had previously sworn that he had such charge, (*id.*, p. 24.)

These were the issues upon which we went to trial, and upon the trial of which the court found that the judgment previously rendered was to some extent *erroneous*, and modi-

fied it accordingly, (*id.*, p. 125), and which the supreme court, upon defendant's appeal, reversed, and then ordered the bill to be dismissed *in toto* as to *all* of the lands, although the judgment originally rendered had not been vacated, and there had been no trial *except as to the* 185 *tracts described in* defendant's *true list*, (*id.*, 18 Judgment of, S. C. 148,) and to review which this writ of error is brought.

ASSIGNMENT OF ERRORS.

1. The court erred in holding that the case, as to the competency and sufficiency of the plaintiff's evidence, was governed by the laws of Iowa, and not by the acts of Congress and the agreements and regulations of the department having charge of the administration of the grant under which plaintiff claims, and in holding evidence incompetent which the Commissioner of the General Land Office had not only held to be competent, but sufficient, and in holding that defendant was not estopped from contesting plaintiff's claims upon any other grounds than those taken by it before the land officers.

2. In holding that it was incumbent upon the plaintiff, under the facts of this case, to prove by parol before the district court that the lands were in fact swamp, and that the defendant was not estopped from contesting their character, or that there was, except as to the *one hundred and eighty-five tracts*, any issue in respect to their character.

3. In holding that upon appeal from the judgment rendered upon the application of the defendant for a new trial, it was competent for it, the Supreme Court, to try any other case than that which had been tried by the district court *upon that application;* and as it did do so, and held against plaintiff's title, under the laws of the United States, it is a Federal question.

4. In holding that the jurisdiction of the district court upon the facts of the case extended beyond the correction of the errors, if any, committed by the Secretary of the Interior, and the granting of such relief as the plaintiff might be entitled to by reason of such correction.

5. In holding that defendant was not bound by the agreement between the State of Iowa and the Secretary of the Interior as to the manner in which the lands granted by the act of Congress of September 28, 1850, should be selected.

6. In holding that, upon the application by defendant for a new trial, it was incumbent upon plaintiff to give any evidence in support of the judgment which it had already obtained, until defendant had given evidence showing that it had a defense and the existence of sufficient grounds for vacating or modifying the same, and in holding that the original judgment was in any manner before that court, except in so far as the district court had adjudged, or should have adjudged, upon the evidence before it, upon defendant's petition to vacate said judgment, that there was a valid defense to the action.

THE QUESTIONS OF LAW

I suppose to be these:

FIRST.

That upon writ of error to a State court in chancery cases, where a right is claimed under an act of Congress, and where all the evidence becomes part of the record in the highest court of the State, that same record being brought into this court, it will review the decision on both the law and the facts, so far as may be necessary to determine the validity of the right set up under the act of Congress.

Republican River Bridge Co. *vs.* K. P. R. R. Co., 2 Otto, 317.

Lytle *vs.* The State of Arkansas, 22 How., 202.

Buel *vs.* Wheaton, 8 Wheat., 324.
The City of Mobile *vs.* Eslava, 16 Peters, 249.
Wilcox *vs.* Jackson, 13 Peters, 498.
Martin *vs.* Hunter's Lessee, 1 Wh., 357.

SECOND.

Where a title is derived by act of Congress from the Government of the United States, it is governed by the laws of the United States until a perfect legal title has vested in the grantee, and in this case, if *it was incumbent upon plaintiff, upon defendant's application for a new trial, to prove its right to the lands not claimed by the defendant, it did prove it* by the evidence required by the act under which it claims and the regulations and instructions of the Department.

United States *vs.* Barrows, 1 Abbott's U. S. C. R., 354.
Seymour *vs.* Phillips, 7 Biss., 462.
United States *vs.* Robeson, 9 Peters, 327.

Selections as evidence, Copp's Land Laws, 1042.

Who is the judge of the sufficiency of the evidence
Martin *vs* Mott, 12 Wh., 31.
Woolner *vs.* U. S., 13 Court Claims, 366.
Railroad Company *vs.* Smith, 9 Wall., 95.

What is meant by *prima facie* evidence
Kelley *vs.* Jackson, 6 Peters, 631, cited in United States *vs.* Wiggins, 14 Peters, 347.

Jurisdiction of Secretary on appeal.
Johnson *vs.* Lee, 47 Mich., 67.
Tarble's case, 13 Wall., 408.
Leech *vs.* Rauch, 3 Minn., 336.
Railroad Company *vs.* Smith, 9 Wall., 95.

THIRD.

When the State made its survey and reported its selections and proofs, in accordance with the agreement and instructions of the Secretary, it could not be prejudiced by any act of the latter or by his refusal to act. Such proofs could be impeached only for fraud or other causes sufficient as between individuals. As to the defendant it was bound by the grounds of contest made by it before the department.

Ballance *vs.* Forsyth, 24 How., 183.
Steele *vs.* Smelting Co., 106 U. S.
Lindsey *vs.* Hawes, 2 Black, 554.
Johnson *vs.* Towsley, 13 Wall., 72.
Bear *vs.* Luse 6 Saw. 156.

In Johnson *vs.* Towsley nearly all of the previous cases were reviewed.

Shepley *vs.* Cowan, 1 Otto, 330.
French *vs.* Fyan, 3 *Id.*, 169.
Quinby *vs.* Conlan, 14 *Id.*, 420.
Vance *vs.* Burbank, 11 *Id.*, 514.
Mills County *vs.* R. R. Co., 107 U. S., 566.
Baker *vs.* Gee, 1 Wall., 333.
Stark *vs.* Starr, 6 *Id.*, 419.
Schulenberg *vs.* Harriman, 21 Wall., 44.
Lansdale *vs.* Daniels, 100 U. S., 113.
Cunningham *vs.* Ashley, 14 How., 383.
Moore *vs.* Robbins, 6 Otto, 530.
Wirth *vs.* Branson, 98 U. S., 118.
State of Minnesota *vs.* Bachelder, 1 Wall., 109.
Cooper *vs.* Robbins, 18 How., 173.
Haydel *vs.* Dufresne, 17 How., 30.
Monette *vs.* Cratt, 7 Minn., 234.

As to the rules of the department see—

Schelter *vs.* Off, 1 Copp's Land Laws, 227.
Johnson *vs.* Lee, 47 Mich., 52.

Warren *vs.* Van Brunt, 1 Wall., 654.
Vance *vs.* Burbank—Ballance *vs.* Forsyth, already cited.

For the general rule as applicable to judicial proceedings see Railway *vs.* McCarthy, 6 Otto, 207.

The case most directly applicable to this *precise* question of any which I have found is Bear *vs.* Luse, 6 Saw., 156, and see—

Lytle *vs.* State of Arkansas, 22 How., 193.
Yosemite Valley case, 15 Wall., 77.

FOURTH.

The commissioner held plaintiff's proofs *prima facie* sufficient, and the act of March 5, 1872, having conferred the authority upon *him*, his action was not subject to review by the Secretary.

Wilcox *vs.* Jackson, 13 Pet., 498.
Boyce *vs.* Danz, 29 Mich., 146.
Johnson *vs.* Lee, 47 *Id.*, 52.
Lamont *vs.* Hampton, 3 Wis., 343.
11 Ops. Atty's Gen., 14.
16 Id., 316.
United States *vs.* Ferreira, 13 How., 40.

But if, contrary to this, the right of appeal did exist, it brought before him such questions, and such only, as were made by the *issues* tendered by the contestant, this defendant, by its notice of appeal.

Schelter *vs.* Off, *supra.*
Regulations as to Appeals, Trans., p. 82.
Notice of Appeal, *Id.*, 40.
United States *vs.* Barrows, *supra.*

To go beyond that was to assume *original* jurisdiction, which it is plain the act did not give him.

Johnson *vs.* Lee, *supra.*

Secretary *vs.* McGarrahan, 9 Wall., 314.

His decision was wrong upon every proposition discussed by him. The question of estoppel was wholly judicial, besides which the supreme court of Iowa have held defendant's plea of estoppel insufficient.

Brill *vs.* Stiles, 35 Ill., 305.

ARGUMENT.

In the foregoing brief I have stated what I suppose to be the ultimate facts in the case. If by *questions of fact*, is meant facts affirmed by one party and controverted by the other, there can scarcely be said to be any such questions in this case which go to its merits. Each has given its own line of documentary evidence. Whether there is any conflict in the parol evidence, I shall consider near the close of the argument.

FIRST.

The proceedings to vacate the judgment and for a new trial—do they present a Federal question?

I have not looked upon those proceedings as involving *only* a question of practice; on the contrary, it seems to me that when the question is, which party has *the title, under the laws of the United States*, to strike a pleading from the files which sets up a good title in one of the parties and sufficient reasons, under the laws of the United States, why his adversary should not be allowed to question his title, or to take from him a judgment by which his title has been held good, *under the laws of the United States*, goes directly to the merits, and both or either party claiming title under the Federal Government, that whether the grounds for vacating the judgment are or not sufficient, is *a Federal* question.

Such a case is not one of Federal *questions* simply; it is a Federal *case out and out.*

But if the position that this Court can examine the question simply as one of error in granting a new trial, is untenable, these *facts* were again presented as a part of the evidence upon the final hearing, and the question of their sufficiency, together with the other facts in the case to defeat defendant's claim was then raised and decided adversely to the plaintiff, when it concededly became necessary for the court to determine upon all of the facts of the case, *including these*, which party had the better title under the acts of Congress. If these facts showed that plaintiff had the better title, clearly the judgment which it had obtained should not have been vacated, for under the State law it is only when the applicant for a new trial shows the better right that the application can be sustained, and if in this case the question as to that right depended upon whether, by the acts of Congress and the proceedings under them, plaintiff or defendant had that right, instead of a question of practice, it is submitted it went to the merits in the strongest possible sense.

Certainly, if the proceedings had been by bill in equity, and the judgment had been vacated upon just the facts here shown, and defendant's answer setting up a title *under an act of Congress* had been stricken from the files, and it denied the right in any way to controvert the allegations of the bill, there can be no doubt that *that* would be a Federal question. The question is the same, the *end* is the same; the difference is only in the way by which it was reached in the the *proceeding* by which plaintiff's property was taken from it, and the *title*, which it set up under an act of Congress, was declared invalid, *worthless*. But I do not wish to impair the argument upon points which I think unquestionable by *seeming* to maintain those which may be doubtful.

The supreme court of Iowa held the burden of proof upon the plaintiff to maintain the judgment which it already had,

although the statute above cited says the cause of the *petition* shall alone be tried. Its prior ruling, to which the opinion makes no reference, had been this.

In Morton *vs.* Coffin, 29 Iowa, 238, which was a proceeding under these statutes, it had said:

"Defendants insist that, as no evidence was given by plaintiff, the court should not have confirmed the judgment.

"No evidence was necessary to prove these facts; neither was it necessary to introduce the note in evidence to enable the court to assess damages. That had already been done upon the first trial; and as no defense to the action was found upon the second trial, the first judgment stood in full force. It could be vacated or set aside only upon the court adjudging, in the second trial, that there was a valid defense to the action. Upon finding that no such defense existed, the second judgment was simply a confirmation of the first one."

SECOND.

Upon which party, under the ISSUES *independent of the question of a new trial, was the burden of proof, as to any or a part of the lands, and is that a Federal question?*

In Republican River Bridge Co. *v.* K. P. R. R. Co., 2 Otto, 317, the rule is stated in these words:

"In chancery cases, or in any other class of cases where all the evidence becomes part of the record in the highest court of the State, that same record being brought here, this court can review the decision of that court on *both the law and fact*, so far as may be necessary to determine the validity of the right so set up under the act of Congress."

In Lytle *vs.* The State of Arkansas, 202, this court said:

"The cause was fully heard on its merits below; and the claim of Cloyes rejected, on the ground that he obtained his entry by fraud in fact and fraud in law; and the question is, can we take jurisdiction and reform this general decree? It *rejected the title* of Cloyes; and, in our opinion, it is not ma-

terial whether the validity of the title was decreed in the supreme court of Arkansas upon a question of fact or of law. The fact that the title was rejected in that court authorizes this court to re-examine the decree, (14 Peters, 360). The decision in the supreme court of Arkansas drew in question an authority exercised under the United States, to wit, *that of admitting Cloyes to make his entry;* and the decision was against its validity, and overthrew his title, and is therefore subject to be re-examined and reversed or affirmed in this court on all the pleadings and proofs which immediately respect the question of the proper exercise of authority by the officers administering the sale of the public lands on the part of the United States."

In Buel *vs.* Wheaton, 8 Wheat., 324, it said:

"The fifth point submitted by the defendant's counsel is, that the decision of the State court was not against a right claimed under a statute of the United States, within the provisions of the 25th section of the judiciary act; since both parties claimed the money in contest under the same act of Congress. This point we consider as already decided in the case of Matthew *vs.* Zane, 4 C., 382; nor do we feel any difficulty in again deciding that the principle which it asserts cannot be sustained. The simplest mode of meeting the proposition is to negative it in its own terms. The decision of the State court was 'against a right claimed under a statute of the United States.' *Buel's claim was altogether founded upon a statute of the United States.*"

And I understand this court to hold that it is of no importance upon what grounds the State court, *in words*, put its decision, provided the case, in its nature and properly considered, necessarily involved the determination of a Federal question, as in this case of a right, or claim of right, under an act of Congress.

In Martin *vs.* Hunter's Lessee, 1 Wh., 357, it said:

"The objection urged at the bar is, that this court cannot inquire into *the title*, but simply into the correctness of the construction put upon the treaty by the court of appeals,

and that their judgment is not re-examinable here unless it appear on the face of the record that some construction was put upon the treaty. If, therefore, that court might have decided the case upon the invalidity of the title (and, *non constat*, that they did not), independent of the treaty, there is an end of the appellate jurisdiction of this court. In support of this objection much stress is laid upon the last clause of the section, which declares that no other cause shall be regarded as a ground of reversal than such as appears on the face of the record and immediately respect the construction of the treaty, etc., in dispute.*

In the City of Mobile *vs.* Eslava, 16 Peters, 249, it said:

"*That the whole case is before this court will be seen by reference to* Barland *vs.* Ross, 1 Pet., 664. There both sides derived title under an act of Congress. The defendant's claim was rejected on a construction given to the plaintiff's patent and entry. It recognized the claim of Mathews *vs.* Zane, 4 Cranch, 382, as having settled the doctrine that where *both sides claim under acts of Congress, and come* to this court, under the 25th section of the Judiciary act, for their construction, the court proceeds *on the whole case, and for either side.* The court say: 'The 3d article of the Constitution, when considered in connection with the statute, will give it a more extensive construction than it might otherwise receive. It is supposed that the act (1789, section 25) intends to give this court power of rendering uniform the construction of the laws of the United States, and the decision of rights and titles claimed under those laws.'"

And further on, in remarking upon Wilcox *vs.* Jackson, it said:

"*We examined the cause precisely as the supreme court of Illinois had done, upon the entire record presented by the special verdict.*"

In the light of the rule here laid down, manifestly the first question is upon which party under the *issues* was the burden of proof, and whether under the pleadings and evidence the plaintiff showed that any of the lands described in its

* If this be the true construction of the section, it will be wholly inadequate for the purpose it professes to have in view, *and may be evaded at pleasure.* * * * How can it be possible to decide whether a title be within the protection of a treaty until it is ascertained what that title is. From the very necessity of the case *there is a preliminary inquiry into the existence and*

petition were of the description contained in the grant under which it claimed.

First. What were the *issues* which the district court tried, or which it was called upon to try, upon the application to vacate its former judgment.

That question I would be willing to submit without a word of comment to any nine intelligent gentlemen in christendom who would take the trouble to read this record; first, what lands the defendant *said* it *claimed* to be dry, and what it *could* prove to be such if it had a chance; and, second, what lands it *attempted* to prove to be such. Upon the order of the court requiring it to state what lands it claimed, it amended its petition, and said that it at all times *intended to show the true character of said lands in dispute;* that the survey of said lands by said Ragan was completed in July, 1877, *and a true list of the dry lands of the lands in dispute, together with the affidavit of the surveyor in respect thereto, is hereto attached, marked "D," and made a part hereof; that said defendant could have shown after said survey, and can now show,* if permitted to defend, *that all of said lands in said list* are not and never were swamp and overflowed within the meaning of the act of Congress of September 28, 1850. (Tr., p. 18.)

The list is at page 184 and contains 185 of the 553 tracts described in plaintiff's petition, and for which it had obtained judgment. The evidence which it offered corresponded with this claim. The district court so understood it, and rendered judgment accordingly. The supreme court simply *overlooked this part of the issues,* at least the opinion says nothing about it.

Second. If it was incumbent upon plaintiff in that proceeding to prove its right to the lands not claimed by defendant, it did prove it.

The *agreement* as to how the lands should be selected was not controverted. Its effect certainly was to give to the selections some value. *It was the evidence agreed* upon, and

unless impeached for fraud, was, like all other evidence agreed upon between competent parties, not only *prima facie*, but conclusively sufficient, if made in accordance with the agreement. As to such evidence this court, in United States *vs.* Robeson, 9 Peters, 327, said:

"It appears that the agent of the Government agreed to pay the moneys referred to upon the claimant producing duplicate certificates of the commanding officer. The contract is a law between the parties in this respect. * * * Can it be established in any other manner without showing the impracticability of obtaining the certificates? Where parties in their contract fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract or show that by time or accident he is unable to do so, and it reversed the judgment appealed from upon the ground that the party had been allowed to give evidence *other than that agreed upon*."

In Railroad Company against Smith, 9 Wall., 95, it said:

"The party must prove his claim *by the evidence required by the act of Congress*."

And in Martin against Mott, 12 Wh., 31, it said:

"Wherever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the exclusive judge of the existence of those facts."

In Woolner *v.* U. S., 13 Court of Claims, 366, the Court said:

"When the law intrusts the decisions of any question of fact to a designated public officer, the sufficiency of the evidence depends upon his own judgment, and cannot be reviewed by any other officer or any tribunal; what would be sufficient for him might not be sufficient for other minds, and what would be sufficient for others might be quite insufficient for him."

If this is not elementary law it is a very near approach to it, too near to accumulate authorities in this Court.

But if this was not in strictness an agreement, but a mere regulation of the Department, adopted for its own convenience, and assented to and acted upon by the State, the result would be the same; first, the act itself gave the Secretary the power to adopt such *regulations* as he might deem best suited to accomplish the proposed end; second, by a general act the heads of the Departments are authorized—U. S. R. S., sec. 354—to adopt regulations for the transaction of business in their Departments.

In United States *vs.* Barrows, 1 Abbott's U. S. C. R., 354 the court said:

"A regulation of the Department in conformity to an act of Congress becomes a part of the law, and of as binding force as if incorporated in the body of the act itself."

In Seymour *vs.* Phillips, 7 Biss., 462, the court said:

"A rule established by the Supreme Court of the United States becomes, to all intents and purposes, of the same effect as the law itself."

This, too, is elementary law. This evidence, if it was not conclusive, was certainly entitled to the *same effect that would have been given to it if the question as to the character of the lands had been tried*, where it ought to have been, before the Land Officers. The instructions of the Commissioner show that the affidavits of the selecting agents, in the absence of fraud,—to be shown, of course, by the party alleging it,—were to be held *sufficient*. No other rule has ever been heard of since the passage of the swamp land grant, so far as I can ascertain. A single citation is sufficient as to what is recognized as the *rule* by the Department. As acted upon there, without question, for more than thirty years, it is stated in Copp's Land Laws, 1042, in this way:

"The tract in question was selected by the State of Missis-

sippi, as swamp, November 10, 1859, under act of September 28, 1850, three months after the land was patented to Cook.

* * * * * * * *

"The tract has not yet been approved to the State, but the selection thereof as swamp has established a *prima facie* case in favor of the State, which may be controverted at a hearing before you. A hearing will be ordered by this office upon the application of the party to the entry through you, and should *he* at such a hearing *establish the fact* that the land is *not* swamp in the eye of the law, the claim of the State thereto will be set aside."

It will be observed that this was not a case where the lands had been *approved*, but one in which, as in this case, the list had not been acted upon.

The question then comes to this, whether, the United States not complaining, a third party may intervene and upset the agreements of the public officers, State and Federal, or nullify the regulations of the departments.

"It is a matter between two sovereign powers, and one which private parties cannot bring into discussion."

Mills County *vs.* R. R. Co., 107 U. S., 566.

"The United States are not complaining, and no other party has the right to complain."

Baker *vs.* Gee, 1 Wall., 333.

"The United States assented to this mode of proceeding, nor can an individual call it in question."

Schulenberg *vs.* Harriman, 21 Wall., 44.

The Commissioner, in his instructions to the surveyors-general, accompanied by forms to be furnished by the latter to the State authorities, and which were actually furnished them, had said:

"The affidavits of the county surveyors and other respectable persons that they understand and have examined the lines, and that the lands bounded by lines thus examined

and particularly designated in the affidavit are of the character embraced by the law, *should be sufficient.*"

Tr., pp. 58–60.

And again, page 73:

"The nature of the evidence required, in cases where the field notes are not indicative of a swampy character, has been fully explained to you in the correspondence already had on the subject. If, at any time hereafter, reliable evidence should be presented to this office that such, or any, selections were erroneous or fraudulent, and that the affidavits accompanying the same were untrue, the investigation suggested by you would be authorized, or such other steps taken as the nature of the case might demand; *but in the absence of any controversy, the affidavit of the State agent must be regarded as establishing the title of the State to lands selected by him, provided he be credible.*"

At page 74, the surveyor general, in writing to the Commissioner regarding certain lists which he had rejected by mistake, says:

"On further information from the Department, I found I had no authority to reject such lands without positive evidence that they were not of the character represented; and having no such evidence, I certified the lists and forwarded them to your office."

What the State understood to be the effect of these selections is shown by the joint resolution of the legislature, beginning upon page 61, in closing which they say, page 63:

"Their original selections by the State and county agents were *prima facie* evidence that they are swamp or overflowed."

And even when asking indemnity for lands which had been sold by the Government—Trans., p. 68—Lowe, Governor, in writing the Commissioner, said:

"If, by presenting satisfactory proof of the swampy character of the lands, you mean we must go behind the returns

and reports of the selecting agents and offer, independent of such returns, extrinsic evidence that they were swamp lands within the true intent of the act of September, 1850, I do not concur in that view."

Everybody knows what *prima facie* evidence is, but sometimes courts seem to think that they are at liberty to disregard such evidence because it is only *prima facie*. This Court has spoken of it in this way:

"What is *prima facie* evidence of a fact? It is such evidence as in judgment of law is sufficient to establish a fact, and if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial if under such circumstances, without any rebutting evidence, they disregard it. It would be an error on their part which would require the remedial interposition of the court. In a legal sense then, such *prima facie* evidence, in the absence of all controlling evidence or discrediting circumstances, becomes conclusive of the fact, that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact. Such we understand to be the clear principles of law upon the subject." Kelley *vs.* Jackson, 6 Peters, 631, cited in United States *vs.* Wiggins, 14 Peters, 347.

Besides, the Commissioner held this evidence (*these* proofs) sufficient.

"In Iowa, the State undertook the selection of the land and the presentation of proof of its swampy character, the ultimate determination of the matter being reserved to the Interior Department. *The State has long since claimed the lands as swamp lands, and furnished prima facie evidence that they are of that character,*"—Trans., p. 47—"*and of that decision there has never been a reversal.*"

Third. But suppose the proofs furnished by the State, though in exact conformity to the instructions of the De-

partment, were not, or would not have been if the defendant had had no notice, or had stayed away, held sufficient, by its appearance and the ground upon which it then put its claims, it is estopped from contesting the character of the lands. Besides, upon general principles, I suppose the rule which applies to the plaintiff as to what *it* must do to entitle it to a standing in court also applies to the defendant; *that it must have made an effort to try its case where it primarily belonged.*

All of these questions—what the plaintiff must do to entitle it to come into a court of equity at all, upon what grounds it might there support its claims, and the effect to be given to the acts of the parties, and the decisions of the land officers—have been so often before this court as to be entirely familiar to all of the profession having anything to do with land titles derived from the General Government. One may almost take from the shelves the volumes of the reports of this court at random and find something upon the subject.

The principles upon which the decisions of these officers will be reviewed are *well* settled. Lindsey *vs.* Hawes, Johnson *vs.* Towsley, in which nearly all of the previous cases were reviewed, Shepley *vs.* Cowan, French *vs.* Fyan, Quinby *vs.* Conlan, and Vance *vs.* Burbank all have *something* to say upon this subject. I think the result about this:

1. That whenever the courts are called upon to review the decisions of the land officers there must be some special grounds of equity jurisdiction.

2. That they will entertain jurisdiction.

1. When the officer has erred either in his construction or his application of the law.

2. When the decision has been fraudulently procured by the opposite party, or when the officer himself has acted fraudulently.

3. When the officer has refused to act at all, and cannot be compelled to do so by *mandamus*.

4. Where the proceedings have been *ex parte*, and the party asking the aid of the court has been without fault.

And that unless the party plaintiff or defendant can bring himself within some one of these categories a court of equity will refuse to aid him.

In the first three classes of these cases, as I understand it, it is incumbent upon the party invoking the aid of the courts to show what questions were litigated before the land officers, what the grounds of their decisions were, and what *errors* were committed by them. As to the character of the frauds which will entitle the party to relief, in Vance *vs.* Burbank this Court said:

"It has been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the Department, so that it may properly be said there has never been a decision in a real contest about the subject-matter of inquiry: False testimony, or forged documents even, are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal. (United States *vs.* Throckmorton, 98 U. S., 61; Marquez *vs.* Frisbie, *supra*.) The decision of the proper officers of the Department is in the nature of a judicial determination of the matter in dispute. * * *

"As to the alleged fraud in the description of the compromise line, it is sufficient to say that, according to the bill, this fraud, if it in fact existed, was discovered long before the contest in the land department, and if it had any importance in the case the amplest opportunity was given to show the error and get relief against the agreement. This was one of the matters that might have been presented to the Land Department, and, therefore, is concluded by the decision of that tribunal. Under these circumstances it would be gross injustice to attempt to open that inquiry at

this late day in favor of Scott himself, or any one claiming under him upon his own title, irrespective of any his wife may have had."

In Lansdale *vs.* Daniels, 100 U. S., 113, after considering the case upon the facts as set out in the proceedings, it said:

"But if the law were otherwise it would not benefit the defendant, as he does not show what questions were litigated before the land officers, nor does the record contain any specification as to what the rulings of the officers were in regard to any particular point. It appears that there was a contest between the parties there, and that the case was decided in favor of plaintiff, but the grounds of the decision were not stated. Such being the state of the pleadings, it is impossible to say that any error of law was committed by the tribunal."

In Cunningham *vs.* Ashley, 14 How., 383, in speaking of the contest before the Land Commissioners, out of which the action then before it arose, it said:

"It is important to ascertain on what ground they decided, and also as to the sufficiency of the evidence to sustain the right as claimed."

In Lindsey *vs.* Hawes, it said:

"We now proceed to inquire into *the grounds* upon which the entry of Lindsey was set aside and the application of Hawes to enter the same land was allowed."

In Moore *vs.* Robbins, 6 Otto, 530, it said:

"In this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that those officers have by a mistake in the law given to one man the land which on the undisputed facts belongs to another, to give proper relief."

In State of Minnesota *vs.* Barnhelder, 1 Wall., 109, it said in this way:

"A court of equity will look into the proceedings before the register and receiver, and even into those of the land offices or other offices where the right of the property of the party is involved, and correct errors of law and of fact to his prejudice."

These cases show too that a party may not go before the land-officers and litigate half of his case, where no fraud or other means are practiced by the officer or the opposite party to prevent his presenting his *entire case*, and then come into the courts, as this defendant is seeking to do, and try the other half. As I understand these cases, the jurisdiction of the courts is *to set the officers right*, not to usurp their functions.

In Ballance *vs.* Forsyth, 24 How., 183, this Court said:

"It is the settled doctrine of this court that in the location and survey of claims arising under acts of Congress, * * * the executive department of the Government has in general exclusive jurisdiction, and that all questions arising upon their location and survey are administrative in their nature and must be disposed of in the Land Office. The plaintiff was aware of the existence of these claims and of the jurisdiction to which their adjustment was confided. * * * If he pretermitted his opposition to their location and survey before the General Land Office, he is concluded by his laches."

In Steele *vs.* Smelting Co., 106 U. S., the language of this Court was this:

"We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that Department, overlook our decisions on the subject. That Department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Neces-

sarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

Courts of justice have no authority to mark out and define the lands which shall be subject to the grant.

Cooper *vs.* Robbins, 18 How., 173.

In Haydel *vs.* Dufresne, 17 How., 30, the Court said:

"Great confusion and litigation would ensue if the judicial tribunals, State and Federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and the divisions more equitably made than the Department of Public Lands could do."

In the State courts, too, this rule has been followed with but little, if any, question.

In Monette *vs.* Cratt, 7 Minn., 234, the court very fully considered the relations of the judiciary to the executive officers of the United States under the land laws, saying:

"As a general proposition the United States Government has always claimed and enforced the right to determine the time and manner in which its lands shall be disposed of, and appointing or selecting a tribunal which should decide all disputes between individuals in regard to the same; and we are not aware of any case in which Congress has permitted the legislative or judicial authority of a State within which the Government lands may lie to enact laws or make regulations for the primary disposition of the soil. It has been the policy of the General Government to permit no interference of any department of the State government in respect to those matters."

Speaking of the act then before the court, which authorized the President to have the lands within a certain district surveyed and offered for sale, it said:

"Subject to the restriction contained in the act, the President had entire control of the matter, and the courts must look to his acts to ascertain what was done in the premises, it was to be done in such a manner and under such rules and regulations as he might prescribe."

Speaking of his instructions, it said:

"They have the binding force of law, and the land officers are a tribunal established by the law to hear and determine disputes concerning the public lands. For that purpose they are clothed with judicial powers to determine the facts by proof satisfactory to them, and, acting under the law which clothes them with these powers, they are themselves the law-making power so far as prescribing the rules and regulations necessary for the performance of their duties."

As to the claim that the courts are to hear and determine disputes concerning public lands, they said:

"We think this position is unsound and that a tribunal has been created to settle disputes of this nature."

As to how *issues* are to be made, and how far the Departments will follow the rules of the courts, the practice of the Department is spoken of by Kirkwood, Secretary, in Schelter *vs.* Off, 1 Copp's Land Laws, 227, in this way:

"The affidavit of contest alleges that Off has wholly abandoned said tract, and that said tract is not cultivated by said party, as required by law.

"As these were the sole charges made by Schelter, Off was required to answer these only, and there could properly be no other issue between the parties for trial. Testimony upon other matters not incident thereto was wholly foreign to the case, and should not have been considered, either by the local officers or by your office. In contests under the land laws, proofs should be confined to the allegations, as in trials at law, and judgment be rendered on the questions raised by

the record only. A large portion of the testimony in this case, however, had reference to the character of the land, and whether it was subject to a timber entry. This was a question impertinent to the issue, and was admitted against the objections of Off's counsel. While I concur with you in the opinion that, under the testimony, the tract was not subject to Off's entry, by reason of the large number of natural timber trees growing thereon, I am also of the opinion that this question was not involved in the contest, because not so charged; and hence, that Off was not required to defend the same, nor should it be regarded in the disposition of the case."

In Warren *vs.* Van Brunt, 1 Wall., 654, the Court said:

"It is next insisted that a joint entry of the forty acres by the two should have been permitted. *No such demand was made upon the Government by Warren. He claimed the right to enter the whole, and upon that claim the parties went to a hearing.* He might have asked to make his entry jointly with Van Brunt, but he did not. He is concluded by his election made at the time. *Having been defeated upon his claim as made, he cannot, in the absence of fraud or surprise, come into court and ask relief upon another which he might have urged then.*"

To the same effect is Vance *vs.* Burbank, already cited; also Ballance *vs.* Forsyth, where the court, in speaking of the claims which it was then considering, said:

"The plaintiff was aware of the existence of these claims and of the jurisdiction to which their adjustment was confided. * * * If he pretermitted his opposition to their location and survey before the General Land Office, *he is concluded by his laches.*"

The general principle as applicable to judicial proceedings is stated by this Court in Railway *vs.* McCarthy, 6 Otto, 207, in this way:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he can-

not, after litigation has begun, change his ground and put his conduct upon another and different consideration. He is not allowed thus to *mend his hold*."

In Johnson *vs.* Lee, 47 Mich., 52, the court held that if the Commissioner, upon appeal, put his decision upon any *other* grounds than those stated before the register and receiver he would act without *jurisdiction*, and his decision would be an absolute nullity.

"The charge made before the register against this complainant was that he had *abandoned* for more than six months the homestead entry made by him April 17, 1875, of the lands in question. The fifth section of the homestead act provides that the lands shall revert to the Government if at any time before the expiration of the five years, it shall be proven after due notice to the settler that the person shall have actually changed his residence, or abandoned the land for more than six months at any time. *No complaint was made that complainant had changed his residence*, or that he intended to give or convey to some one else the benefit of his entry, even if the latter could have then been inquired into. *The only question in issue under the notice* was that of abandonment, and this was the only question that could have been or was inquired into by the register, or could be considered on appeal by the officers of the department. *And if they disposed of the case finally on other grounds, their jurisdiction in the premises was not appellate but original*, and this it is not pretended has been conferred. The register on the hearing and the Commissioner on appeal decided that complainant had not abandoned the land, and upon this ground there never was a reversal."

But the case most directly applicable to this *precise* question of any which I have found is Bear *vs.* Luse, 6 Saw., 156, in which the court said:

"A contest was had in the Land Department between the inhabitants of Marshfield and Warwick upon the question of the validity of his enty, which was decided in favor thereof. In that contest *the only objection made to the donation entry was*, that being upon unsurveyed lands the settler

was not entitled to commute the required residence thereon by paying for the land at the end of one year's residence at the rate of $1.25 per acre; and that question being one of law merely, depending for its solution upon the proper construction of section one of the act of February 14, 1823, this court might now, if the plaintiff had any interest in or right to the premises, review the action of the Land Department thereon, and annul it, if erroneous. But as it is, that action can only be reviewed in a suit by the United States to cancel and set aside the patent on the ground that it was illegally issued. But even if the plaintiff could maintain a suit to affect this patent, yet no mere question of fact decided by the Land Department in the progress of the matter, or which *might have been* made therein, can now be reviewed by this court, except for fraud or mistake, other than an error in judgment in estimating the value or effect of evidence. (Johnson *vs.* Towsley, 13 Wall., 83; Shepley *vs.* Cowan, 1 Otto, 340; Aiken *vs.* Ferry, C. C. Dist. of Ore., November 7, 1879; Stephens *vs.* Cragie, *Id.*, November 2, 1879.) Therefore the questions whether Warwick's settlement, occupation, and entry were, in fact, for himself or for another, or whether the Marshfield claim was occupied as a town site, or settled upon for purposes of business or trade, at or prior to Warwick's settlement thereon, cannot be inquired of in this suit. *For although these questions were not specifically made in the contest in the Land Department, they were plainly within the scope of the inquiry, and might have been raised and decided if the contestants had desired.* Impliedly, the decision of the Secretary of the Interior that the Warwick claim was valid and lawful, included every question of fact that might probably have been raised and decided in the progress of the trial concerning it. If the rule were otherwise, this case is a good illustration of the intolerable vexation and delay which would attend the procuring of titles by settlers on the public lands. As has been stated, the contest in the Land Department was made upon the single proposition that the Warwick donation, being unsurveyed, could not be purchased, and that Warwick's removal from it, after a residence thereon of less than two years, and the payment of $1.25 therefor, was, in effect, an abandonment of his settlement; a failure to perform the conditions subsequent to the grant, whereby the premises reverted to the United States,

and were open to settlement under the town-site law. *The proposition that Warwick's settlement was for the benefit of another, or that the place was* ✱

As to the entire independence of the Federal departments of the State courts, this Court, in Tarble's case, 13 Wall., 408, said:

"The State and National Governments are independent in their respective spheres. How their respective laws shall be enacted, how they shall be carried into execution, *and in what tribunal or by what officers, and how much discretion or whether any* shall be vested in their officers are matters subject to their own control, and in the regulation of which neither can interfere with the other."

And this is the language, too, of the State courts, in Leech *vs.* Rauch, 3 Minn., 336, where the Court said:

"The State courts have nothing to do with the question as to whether an entry was properly or improperly made; as to whether sufficient or legal proof was made to entitle the applicant to enter; nor, indeed, as to whether there was any proof at all. These are questions entirely and only within the province of the register and receiver of the General Land Office."

This, too, is elementary law, but it is submitted that it is decisive of this question. In Cunningham *vs.* Ashley, 14 How., 383, it said:

"Every legal requisite appears to have been complied with, all the facts necessary to establish complainant's right were before the register and receiver. His application was not rejected on account of any deficiency in the proof, but on the ground of the New Madrid selections."

And again:

"Had it been objected on that application that he did not prove his improvement and occupancy, the witnesses would at once have been called. With this exception he did everything the law required to perfect his claim. Having done

✱ *occupied as a town at and before his settlement, does not then seem to have been thought of, but is brought forward at this late day and in this form to defeat and nullify the action of the land department in that contest.*

everything which was in his power to do, the law required nothing more, and the defendant, who caused the "floats" to be located on the premises, had full notice of the complainant's rights."

But, it was argued in the court below that the *Secretary* did not make any decision as to the sufficiency of the plaintiff's proofs, that he simply directed the Commissioner *not to go any further*. The Commissioner had decided that they were sufficient, and *that* decision the Secretary did not reverse; the only question which the defendant submitted to him was as to the effect of the prior certification. If he decided that correctly, in view of the act of Congress requiring the Commissioner to take up the list, we suppose it must follow that the whole question was, as he seemed to have thought it was, one for the courts; but if his decision was wrong, it was procured by the defendant, and we submit that it is bound by the election which it then made, *the stand which it then took*. It is a familiar principle that a party cannot bring forward his case by piece-meal.

If the *grounds* of the decision, and especially where both parties have been heard, have nothing to do in limiting the jurisdiction of the courts, what is the meaning of all that is said upon that subject in the cases above cited?

But it is further said the Commissioner did not decide *to allow* the list; he only decided that the evidence was *prima facie* sufficient. If it was *prima facie* sufficient *there*, upon what principle could the courts refuse to receive it if they only take jurisdiction in this class of cases when no other complaint is made than that the officer has committed an error of law—*to correct* him, and to do what he ought to have done upon the evidence before him? But we can stand upon broader grounds, and say, if this was the evidence either agreed upon or required by the officer appointed to administer the grant, and *he* was satisfied with it, if the Government did not complain, no third party can. The supreme court of Iowa did not *in terms* decide any of these

questions; it certifies that they were made. It only decided that a certain statute of that State did not make the list and proofs evidence, and nobody claimed that it did. We claimed, and now claim, that the case throughout, and in all that affects the plaintiff's claim of title, was governed by the laws of Congress, and the requirements and regulations of the department. The case in its nature stands there, and the court has certified that we made the claim, but it has expressed no *opinion* as to whether we were right about it or not. It has gone to the statutes of Iowa, and because they do not make its list evidence dismissed its bill, although nearly two-thirds of its claim stood admitted.

If this plaintiff has not done all that it could do to have its claims passed upon where they ought to have been passed upon, and by the officers that ought to have passed upon them, it is not because it has not tried every thing and every way that anybody has ever suggested to it as the most likely one for getting such a hearing. The decision by which the Acting Secretary finally dismissed it from further audience, and which the defendant now seeks to charge upon *him*, was made upon its plea, and we submit that it has no ground of complaint if required to abide the consequences.

In the Yosemite Valley case, 15 Wall., 77, this Court said

"There is no question about the correctness of the doctrine here announced; it is only a familiar principle which is stated, that where one offers to do everything upon which the acquisition of a right depends, and is prevented by the fault *of the other side*, his right shall not be lost by his failure."

It certainly was not our fault that the defendant declined to present its claims in all their aspects, and to support them upon all the grounds known to it, before the land officers.

To hold that any claimant under the laws of the United States may by his own act procure an erroneous decision by the executive officers, and thereby deprive his adversary of the right to have his claims heard before the tribunal ap-

pointed and *upon the evidence* provided by law, would be to enable him, to quote from French *vs.* Fyan, *to substitute a jury, or the court sitting as a jury, for the tribunal which Congress has provided for determining the question.*

It was said in the court below that ordinarily parties in pleading estoppels rely upon decisions in their favor; that this was the first time that it had ever been *heard* of that the *beaten* party had set up the decision by which he was beaten as an estoppel in his favor. What did any of the parties plaintiff in the cases cited go into the courts at all for if they had not been *beaten* by the land officers? And what is the meaning of all that is said in these cases as to inquiring into the *grounds* of the decisions, and correcting the *errors* of the land officers, if the parties were at liberty to try the case in the courts precisely as if there were no special tribunal having primary jurisdiction of the matter?

None of the officers ever rejected plaintiff's lists because its proofs were not in conformity with the instructions of the Secretary, or because they did not show the lands to be swamp, or because they were in any respect insufficient, provided that lands which were not both swamp and overflowed were embraced by the grant.

1. The surveyor general *rejected* the list because it did not show the lands to be both swamp and overflowed. *No other ground* of objection was made to it. (Tr., p. 33.)

2. Wilson, Commissioner, rejected it because the surveyor general had not reported it according to the *established method*—in other words, because he allowed it to remain in his pigeonholes for six years after the order under which he had rejected it was overruled by the Secretary, and until his office was abolished, when it was *found* there by the Commissioner. (Tr., p. 34.)

3. Delano, Secretary, rejected it or refused to act upon it, not because he thought the surveyor general's reasons good,

or the Commissioner's good, but because it was not *shown* that it had been filed with the surveyor general within the two years—as was then supposed necessary, since held otherwise by this court—required by the act of Congress of March 12, 1860. "For *that* reason I affirm the decision of the Commissioner," and he adhered to his decision when Mr. Harvey asked permission to show when it was filed there, and refused such permission. (Tr., p. 42.)

4. And finally the Acting Secretary directed the Commissioner to go no farther—first, because the State was estopped; second, because it was not according to the established method to make any inquiry under the swamp-law grant after the lands had been certified under a railroad grant; and, third, because a certification under a railroad grant was an *entry* under the homestead or pre-emption laws within the meaning of the proviso in the act of March 5, 1872. (Tr., p. 50; act, *id.*, p. 44.)

We maintain that defendant is estopped both by what it did do and by what it did not do.

The notice of appeal shows upon what grounds it then placed its rights—that the Commissioner had no jurisdiction according to the general usages of the office, and that the act of 1872 gave him none. (Tr., p. 49.)

Regulation as to Appeals, p. 82.

Letter of Steiger to plaintiff's attorney, *Id.*, 83.

Notice to Vandeventer, *Id.*, 56.

That he received it, *Id.*, 57.

That he had charge of the lands, *Id.*, 24.

Notice to Calhoun, *Id.*, 70.

Notice to Steiger, *Id.*, 45.

It made no claim that the lands were not swamp by its original owner, *Id.*, 4.

Commissioner's notice to plaintiff's attorney, *Id.*, 81.

Harvey's request that the lands be examined by *any* test, *Id.*, 41.

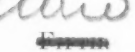
Commissioner's decision that the evidence on file was *prima facie* sufficient, *Id.*, 47.

That this list was one of those for which the act of 1870 was designed to provide. Harvey's testimony, *Id.*, 77.

Commissioner to Calhoun, *Id.*, 79.

Commissioner to plaintiff's attorney, *Id.*, 80.

Same to same, *Id.*, 81.



The decision of the Commissioner remains in full force. The Secretary assumed a jurisdiction which the law did not give him, and the Commissioner as his general subordinate felt bound to obey. For that reason we were unable to obtain patents upon proofs which he held prima facie sufficient.

If there are any questions here which admit of discussion, I suppose they are these:

First, whether the act of March 5, 1872, made it the duty of the *Commissioner* to receive and examine the selections now here, and to allow or disallow them; second, whether his action as to the matter was subject to review by the Secretary of the Interior upon appeal; and, third, if subject to appeal, which of them was right, he or the Secretary.

I do not understand that any question is made as to whether the list of *itself* comes within the act. The Commissioner decided that it did, and the Acting Secretary that, *as to these lands*, it did not; not because the act was not passed for the *express purpose* of requiring the Commissioner to receive and act upon this list, but because the railroad certifications were *entries* in such a sense as to bring these particular lands within the *proviso* in the act. In other words, the *only* lands with reference to which this long contest had been had, and with reference to which the act was passed, were taken out of it by a *proviso* which rendered it a *felo de se*.

That it was the duty of the Commissioner to take up the list and *examine it* and *see* whether it ought to be allowed or disallowed, I think may be safely *assumed*. If it was irregular, this act cured the irregularity; if it was not in *time*, as the lands, if swamp, were undoubtedly excepted from the grant under which defendant claims, it was a question only between the Government and its grantee, but even that is of no consequence, under the decisions of this Court, that the grant was *in presenti;* if the method of *proof* was originally adopted by the Secretary upon an erroneous idea as to the extent of his powers, that too was cured by this act. In short, the act made it *evidence* at that time to be *examined* and *allowed* or *disallowed*, by the officer named in it.

And unless the Secretary could lawfully say that he would not do what this act commanded him to do—for he assumed that it was addressed to him as well as the Commissioner—he should have taken up the list and acted upon it one way or the other. Of course it is claimed, and perhaps properly, that he did take it up and reject it. I would be quite content to take that position and rest this case upon the legal sufficiency of the grounds upon which he rejected it; but as I maintain that he had nothing to do with the matter, that no appeal lay from the decision of the Commissioner, I do not feel like accepting that challenge and standing upon it alone.

As to his doing as he *pleased* about it, in other words, whether, if the duty was imposed, it would be in his discretion to discharge it or not, the following opinion of Judge Hoar, Attorney General, in the matter of the New Idria Mining Company (13 Opinions of Attorney General), is, I think, in point, with some emphasis:

"If the mining company are prepared to establish to the satisfaction of your department their claim under the statute to receive a patent for certain lands in California, they have the legal right to have the question of their claim to such patent passed upon; such that your department is bound to

consider and determine the same, notwithstanding the request from the Judiciary Committee of the House of Representatives for a suspension of action. Their claim, as I understand it, is of a title to land created by law. If under the law they have this title, and are prepared to furnish the proper proof of it, the law gives them the right to a patent, and the issuing of a patent is not made discretionary with the executive officers of the Government. The question, then, resolves itself into this: Whether, when a right is created by law, and a duty devolved upon an Executive Department under the same law, the enjoyment or enforcement of such right can be suspended at the request of a committee of the House of Representatives? I am unable to say that this result could be obtained by any action even of the whole House of Representatives, or of both branches of Congress, unless by a change in the law itself. To deprive any person of a right which the law creates, at the request of anybody, would be a novel idea under a system of government which is supposed to be a government of laws and not of men. If it were a subject depending upon your discretion, where you might properly regard all the equities of the case, and the probability that a decision at one time or another might affect them favorably or otherwise, the probability that Congress would take material action upon the question involved, might well have an important influence in determining your action, and the suggestion of a committee of Congress or its chairman, would be entitled to great respect. But it cannot be that any person can rightfully be hindered in the enjoyment of his legal rights upon the suggestion of a possibility that the law may at some time or other be changed. * *

"An executive officer has no right to omit or delay the discharge of the duties imposed upon him by law at the request of the committee of the House of Representatives, and can only pay attention to such request when it affects a discretionary power."

APPEAL.

Although I suppose it to be elementary that when a duty is specifically imposed upon a particular officer by his name of office, no appeal lies, unless so provided by the act, probably I ought not to pass the point without calling your

Honors' attention to some of the authorities upon that question.

In Wilcox *vs.* Jackson, 13 Peters, 498, this Court, in speaking of the jurisdiction conferred upon the register and receiver of the land office, said:

"No appeal having been given from their decision, it follows as a consequence that it is conclusive and irreversible. This proposition is true in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction, where no appellate tribunal is created."

The supreme court of Michigan, in Boyce *vs.* Danz, 29 Mich., 146, in speaking of the powers of the register and receiver of the United States land office, said:

"If we are correct in this, the case of complainant would appear to be made out; but if we err in our conclusions, the fact still remains that the register and receiver of the land office have accepted the proofs furnished by complainant as satisfactory, and have taken his money and issued the usual duplicate. And the question would then be presented whether their conclusion is not binding upon us, even though we might regard it as erroneous. Under the statute, the proofs are to be made to the satisfaction of these two officers, and we have not been referred to any statute which authorizes the Commissioner of the General Land Office to review and reverse their action in cases like these."

In Lamont *vs.* Stimson, 3 Wis., 553, the Court said:

"Neither is the decision of an officer in such a case subject to revision or reversal by any other officer or tribunal, because the act does not provide an appeal."

But, perhaps, however well settled the general rule may be, its application in this particular instance, owing to the *general* relation of the Commissioner to the Secretary, may not be quite so clear. It is said in McGarrahan's case, *perhaps* an appeal would lie by reason of the general power of supervision which the Secretary has over the acts of the Commissioner, but that would not reach this case, for there

the duty was not *specifically* imposed upon the Commissioner. The Commissioner, both at the time of his decision, and that of the Secretary, assumed that the right existed. What the *Secretary* thought about it, except what may be inferred from the fact that the matter remained in his hands for over a year without action, and was finally acted upon by another in his absence, we have no means of knowing. But whatever *they* may have thought about it, the question is a judicial one, and is now here. I suppose the authority next to that of the courts, which is entitled to the greatest respect in the construction to be given to the acts of Congress, and especially such as relate to the *departments*, to be the law officer of the Government. Acts of this kind have been, upon a number of occasions, construed by the attorneys general.

By an act of Congress of March 3, 1857, 11th Statutes at Large, page 200, it was provided that the Commissioner of the General Land Office should state an account between the United States and certain States therein named, in relation to matters properly within the jurisdiction of the land officers of the General Government. The act provided, in terms, as follows: "That the Commissioner of the General Land Office be, and he is hereby, required to state an account between the United States and the State of Mississippi," &c. The act now before this court provides, in terms, that "the Commissioner of the General Land Office is hereby authorized and required to receive and examine the selections, and allow or disallow the same," In respect to the act of 1857, Bates, Attorney General, in a communication addressed to the President, 11th Opinions Atty. Gen., 14, said:

"By the terms of this act no powers are granted to, or duties imposed upon either the President or Secretary of the Interior, but only to and upon the Commissioner of the General Land Office. * * * Where the law requires a particular officer, by name, to perform a duty, not only must he perform it, but no other officer can lawfully do so; and were the President to perform it, so far from taking care that

the laws were executed, he would be violating them himself."

Quoting from Attorney General Wirt, after reviewing the opinions of his predecessors, he further said that in the case then submitted to him under the act above referred to, there was no right of appeal.

In the matter of certain claims under the treaty of 1819 with Spain, 16 Opinions Att's Gen., 316, Devens, Attorney General, said:

"It is a well-established proposition that where the laws impose upon a particular executive officer a duty, and he has acted, there is no right of appeal from his decision to the President, or any other executive officer, unless such appeal is expressly provided for."

He then reviews the opinions of his predecessors upon this subject, and after citing United States *vs.* Ferreira, 13 Howard, 40, concludes as follows:

"The law having imposed upon the Secretary, and upon him alone, the duty of reviewing the proceedings of the judges, his decision is an end of the matter, and I again most respectfully submit to the President that it falls neither within the sphere of his official duty, nor of his authority to give any direction to the Secretary of the Treasury in any of these cases."

In the course of his opinion he referred to the Des Moines river grant to Iowa, and said:

"In 1850 an attempt was made to appeal from a decision of the Acting Secretary of the Treasury concerning the extent of that grant; also to invoke the aid of the executive to compel the Secretary of War to do a certain act, which was within his province and discretion, and which he had refused to do; and, quoting from the opinion of Crittenden, Attorney General, 5th Opinions Att'ys Gen., 275, neither the act of Congress in the one case, nor the contract in the other, makes any reference or delegation of authority to the Presi-

dent respecting any matters now brought before him. * * * The interference of the President with the performance of the particular duties assigned by law to subordinate officers, either on the grounds of correcting errors or supplying omissions, would in general be exceedingly injudicious, if at all warrantable."

But if, contrary to this, the right of appeal did exist, *what questions did it bring before the Secretary, and was his decision right or wrong?*

First. It brought before him such questions and such only as were made by the *issues* tendered by the contestant, this defendant, by its notice of appeal.

Schelter *vs.* Off, *supra.*
Regulations as to appeals, Trans., p. 82.
Notice of appeal, *Id.*, 40.
United States *vs.* Barrows, *supra.*
Johnson *vs.* Lee, *supra.*

His decision was wrong upon every proposition discussed by him.

1. In assuming that the question, whether the State was equitably *estopped*, was before him, or that it was within his jurisdiction to decide it. First, there were no *facts* before either him or the Commissioner upon that subject. Second, it was not competent for him to receive information of that kind from any source. Third, if that was a good reason why the list should not be taken up and examined, Congress ought not to have passed the act requiring the Commissioner to take it up and examine it. Fourth, the question in all its aspects and features was strictly *judicial.* (Brill *vs.* Stiles, 35 Ill., 305.) Fifth, no such question was raised before the Commissioner. Sixth, no such question is made in the notice of appeal, and the regulations of the Department limit the Secretary's examination to the questions *specified* in the notice of appeal.

2. In assuming that the *practice* of the Department as to refusing *to hear* an application under one grant because the lands had been *ex parte* certified under another, could not be changed by an act of Congress. It is useless to discuss what the practice of the Department was, unless the officers of the Departments may establish rules of practice which Congress has no power to change. If plaintiff's selections can be or have been shown to come within an act which was prepared by the commissioner appointed by the State, who had made a *test case* of this identical list and prepared this act, *because* as the law then stood the land officers had refused to receive and act upon it, for the express purpose of requiring them to receive and act upon it, to do what they had before refused to do, because it was not according to *their established method*, it is quite immaterial what the former practice was, for unless the power of Congress is inadequate to that end, this act *has done away with that practice;* that is what it was passed for. That the act was prepared for that purpose—to require the Commissioner to receive and examine lists embracing lands which had been previously certified under the railroad grant—there is no controversy; but the Assistant Secretary discovered that the *sole* purpose which it was designed to accomplish was defeated by a proviso. I will not stop to discuss the general principles involved in such a proposition, or what the rule is as to which shall prevail when a proviso and the body of the act are inconsistent.

ENTRY.

It appears—Trans., p. 48—that somebody had claimed before the Commissioner that the word "*entry*," as used in this act would exclude all lands which had been previously certified under the railroad grant, as to which he said:

"I do not think so; such certification is a mere identification of such lands as were within the prescribed limits. *An entry means a purchase with money, or a location under or by virtue of some kind of warrant or scrip.*"

The language of the proviso is *without prejudice to legal entries and rights of bona fide settlers* UNDER THE HOMESTEAD AND PRE-EMPTION LAWS.

The history of the act is, that it was passed for no other purpose than that of settling by the Department the controversy between the swamp land claimants and the railroad companies; there were no other lands to which it was applicable.

The Secretary responded in this way:

"It undoubtedly has the meaning you give it; but I think, as *used in said act*, it should have a more general meaning, and be construed to include any and every lawful appropriation of lands. Lands certified to railroads, in accordance with the terms of the grant, are thus appropriated."

Ib., 51.

The *general* rule, that when certain words are used in a later statute, the meaning of which had, prior to its passage, as used in an earlier one, been settled by the highest court having jurisdiction of the subject, they will, unless there are very strong and almost unanswerable reasons to the contrary, be held to have the same meaning in the later one nobody would think of questioning.

From the beginning, as all the world knows, these railroad certifications—always made, as in this case, subject to all valid interfering rights—have been regarded simply as identifying the *limits* of the right to select, as fixed by the definite location of the particular road; and by the act of Congress of August 3, 1854, the first act that gave them any other effect—1 Lester's L. L., p. 236—it is declared that when the lands certified *are not of the character embraced in the grant*, they shall, so far as those lands are concerned, *be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby.*

But we are not without the authority of this court as to the meaning which should be given to the word *entry* when

used in the land laws. It has been used in connection with the disposition of the public lands, in one sense, and one sense only, for more than fifty years.

In Chotard *vs.* Pope, 12 Wh., 256, the court said:

"The term entry, as applied to appropriations of land, was probably borrowed from the State of Virginia, in which we find it used in that sense at a very remote period. Many cases will be found in the reports of the decisions of this court in which the titles to Western lands were drawn in question, which will show how familiarly and generally the term was used by the court and bar. Its sense, in the legal nomenclature of this country, is now as fixed and definite as that of many terms borrowed from the common law. It means, that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known in the legislation of several States by the epithet of an entry-taker, and corresponding very much in his functions with the registers of land offices, under the acts of the United States. In the natural progress of language, the term has been introduced into the laws of the United States, and, by reference to those laws we think the meaning of the term will be found to be distinctly confined to the appropriation of lands under the laws of the United States at private sale."

There is one farther suggestion in the opinion of the Acting Secretary which, perhaps, should not be passed entirely without notice. He says:

"If the State of Iowa had any rights to the lands now claimed by her which she has not granted or forfeited, she has a complete remedy therefor in the courts, without the aid of this Department."

I doubt very much whether this is not the first paper emanating from one of the principal executive officers of the Federal Government in which the officer has excused himself from the performance of a duty specifically imposed upon him by an act of Congress—for by entertaining the appeal and directing the Commissioner at all assumes

that he looked upon the act as imposing the duty upon him, if upon any one—by saying that the party could go into the courts, and at the end of a lawsuit get what he was entitled to, then and there, and in the way and by the act of the officer provided by law, by *his* act. Of course, any man whose rights are denied him can go into the courts; but as between the citizen and the heads of the Departments as to matters emanating from the Government, rights derived from the Government, the right loses half its value when it can be asserted only at the end of the law's delays.

Assuming that it is plaintiff's title only that is in question and that the burden upon this application for a new trial was upon it in some way to establish it, to entitle it to the relief prayed for, it is submitted that it may be, and that it is, established first as to all the lands not described in defendant's list of dry lands by the admissions of the petition for a new trial; second, that its list and proofs were *prima facie* evidence in its favor; and, third, that defendant is estopped from contesting its claims upon any other grounds than those taken by it before the land officers; that the essential question here, as there, is the legal sufficiency of those grounds to defeat plaintiff's recovery, *assuming the lands to be swamp*. Up to the time of filing *this* petition, and in all the grounds upon which it had resisted plaintiff's claims, including its original answer in this suit, defendant had claimed that the question as to the character of the lands was not an open one; that by the certification it was entitled to them, whether swamp or not, notwithstanding this Court had decided directly to the contrary as early as Railroad Company against Smith, 9 Wall.

The issue now tendered is not only made for the first time, and after repeated refusals to make it when invited to do so, or, at least, told by the land officers, that it could do so, but upon a survey made twenty-seven years after the grant under which plaintiff claims, and after allowing judgment to be taken by default. The history was already a long

one, too long, we submit, even if the case were not strictly within the rules as to the law of estoppels, to be *begun* again, and, especially, upon a new line of operations and before a new tribunal.

Besides all this the right of the State under the swanp-land grant, and, consequently, that of the plaintiff, does not at all depend upon whether a court or jury, or somebody else or some other tribunal than the Secretary of the Interior, the one designated in the act of Congress, should find the land to be of the description named. The only grant that Congress made to the State was of such lands as the *Secretary* should find to be of that description, and even though it might be subsequently shown by the most satisfactory evidence that his judgment was erroneous, it would not in the least affect its title. It was not the purpose of Congress—it would have been an anomaly had it been so—that its grant should depend upon anything so uncertain and subject to so many contingencies and influences, as the results of a jury trial, or of any local tribunal sitting in the place of a jury.

In the court below something was said about the *solemnity* of the Government and State patents, that is a matter about which nothing need be said in this Court. If the officer issuing them had a right to do so, they are sufficiently solemn for all practical purpose; if he had not, their value is exactly that of so much waste paper. It may or may not strengthen plaintiff's title, or the *evidence* of its title, by showing with what constancy the State, both by its legislative and executive officers, has *defended* it. Almost immediately after the railroad grant the railroad companies began to make claim to the swamp lands within the limits of their locations. Governor Lowe, in 1858, (Tr., p. 69,) protested against the claim in this way:

"I recently heard a rumor that either you or the Secretary of the Interior had held that whatever swamp lands fall within the grant of lands made to our railroads, shall go to them instead of the State or counties; if such is the case I

have no vocabulary that will sufficiently express the confusion, embarrassment, and dissatisfaction, that will follow such a decision; and if the list of swamp lands now being made out are made out with reference to such a decision."

In his message of 1860, (Id., 122,) he called the attention of the General Assembly to it, in this way:

"In order to put an end to this unhappy controversy which has been the source of so much complaint in the State, I cannot but feel that it is my duty to recommend the adoption of a joint resolution by your bodies instructing the Governor to sign no more certificates of the description spoken of to any of said companies until they shall file in his office a written relinquishment of their supposed right to contest the swamp land selections that may fall within the limits of their grants, and a consent on their part that the Commissioner of the General Land Office may proceed to patent them to the State as other swamp land."

In 1862 the General Assembly sought to protect the rights of the counties under the swamp-land grant along the line of the road to which defendant claims to have succeeded by the following act:

An act to require the Dubuque & Sioux City Railroad Company to release certain swamp, school, and river lands on the line of said road, and providing for the compensation therefor by an extension of the time of building said road.

"SECTION 1. *Be it enacted by the General Assembly of the State of Iowa*, That from and after the taking effect of this act the Governor of the State of Iowa shall not certify to the Secretary of the Interior that any part of the road is completed on the line of the Dubuque & Sioux City railroad, as now provided for by section four of the act of Congress making said grant, approved May 15, 1856; nor shall said road be entitled to receive any certificate for lands on said line of road until said company shall have executed a deed of release of all the swamp and overflowed lands now approved or that may hereafter be approved by the surveyor general, in any county within the fifteen-mile limits of said road, to the county in which such swamp and overflowed lands as

were returned and certified to the General Land Office and ratified to the State by act of Congress of March 3, 1857.

"Approved April 7, 1862."

At the same session it adopted a joint resolution disclaiming all selections under the railroad grant, of lands *selected* as swamp:

Be it resolved by the General Assembly of the State of Iowa, That whereas the Commissioner of the General Land Office of the United States has rejected certain lists of lands selected as swamp and overflowed lands within this State, by the agents of the State, under the act of Congress approved Sept. 28, 1850, under the supposition that the State of Iowa claims said lands for railroad purposes under the act of May 15, 1856; and whereas many of the lands so rejected have been sold to *bona fide* purchasers by authority of the General Assembly of this State, and are now in actual possession and cultivation by citizens of this State; therefore,

Resolved, That the State of Iowa hereby disclaims any purpose or intention to claim the lands so selected as swamp and overflowed lands, under any other grant or for any other purpose than is expressed in the act of Congress approved Sept. 28, 1850.

Resolved, That any selection of any of the swamp and overflowed lands of this State for railroad purposes, or the selection for railroad purposes of the lands selected as swamp and overflowed lands by the agents of this State prior to March 3, 1857, has been without authority or consent of the State of Iowa, and any and all such supposed acts upon the part of the State of Iowa are hereby expressly disclaimed.

Resolved, That the secretary of state be requested to furnish a copy of these resolutions, duly attested under the seal of the State, to the Commissioner of the General Land Office and the Secretary of the Interior of the United States, and the Governor of this State be authorized to take such steps as shall secure to this State the swamp and overflowed lands under the acts of Congress approved Sept. 28, 1850; March 3, 1857; and March 12, 1860.

Approved April 7, 1862.

In 1866, as stated near the beginning of this argument, it appointed the register of the State law offices a commissioner

to secure a settlement of these grants, which he endeavored to do by making *a test case of the list now here—id*, p. 33. As he met with unexpected difficulties, which your honors will find set out at the page of the record just cited, the Legislature at its next session sought to strengthen his hands by a joint resolution, as follows:

"Joint resolution of the Twelfth General Assembly relating to swamp land selections made by the agents of the State during the years 1859, 1860, and 1861.

"Whereas, The swamp land selections made by the agents of the State of Iowa in 1859, 1860, and 1861, in the counties of Emmett, Buena Vista, and ten townships in Dickinson were made in due time and duly forwarded to the office of the surveyor-general of Iowa; but were not promptly filed in the Department at Washington by the surveyor general; and

"Whereas, By the present ruling of the Department said returns cannot now be made without a special act of Congress authorizing their reception by the Department; therefore—

"*Resolved by the House of Representatives, the Senate concurring*, That our Senators in Congress be instructed, and our Representatives be requested, to use their best efforts to procure the passage of an act directing the Department to receive and pass upon said returns in the same manner as if they had been filed in due time.

"*Resolved*, That the Secretary of State be directed to forward a copy of this resolution to each of our Senators and Representatives."

Approved March 21, 1868.

In the course of time, ~~and perhaps in view of the difficulties which Mr. Harvey's report shows that he encountered~~, Congress responded to the first of these resolutions by the passage of the act so often referred to, but although Mr. Harvey, in his report of his *six years'* service in that line, in tendering his resignation, expressed the belief that the *end* had been reached, the twelve years since that time while they have added age to the controversy, have been barren of re-

sults. In 1868—(*id.*, 85)—the assembly resumed the grant to the Dubuque Company, March 10, and before it made any other disposition of the lands, March 21, adopted the resolution last above as to this and other suspended lists. After that, April 7, the very day upon which it adopted the resolution last above, by which it disclaimed all selections made under the railroad grants of lands selected as swamp, it granted what remained of the lands previously granted to the Dubuque Company to this defendant, but *ex abundanti cautela*, with this condition:

"Nothing in this act contained shall be construed to affect in any way the titles, rights, or interests of persons or corporations not expressly named in this act." (Trans., p. 87.)

The reply alleges that the patents to defendant were issued by mistake, and without knowledge by the Governor who issued them that they embraced any lands which had been selected as swamp, and the Governor testified that when he issued them he did not know that the lands had been selected as swamp lands; that he supposed the selection under the railroad act was *all straight*, and that the only question was whether the companies had earned the lands under the law.

Trans., pp. 123–24.

These patents, it will be observed, were issued in direct violation of the act of 1862, above printed. This defendant had succeeded only to what *was left* of the grant to the Dubuque company, and subject to its conditions, and the Governor was prohibited from certifying—the only way in which titles were then evidenced—to that company until it should relinquish all claims to any swamp land selections approved, or which should thereafter *be approved*.

I have stated these things, not because I suppose plaintiff's title, or its claim to the relief which it asks, depends upon the *weakness* of defendant's claims or equities, but rather to

preserve the *history* of the case, and to show that from the beginning the State with which alone the Department treats in settling these grants, theirs as well as ours, has done all that *it* could, to protect the title which we claim.

The Parol Evidence.

Near the beginning of this argument I said that if by questions of fact was meant controverted questions, that there were scarcely any such in this case.

The defendant offered to prove by Mr. Regan, its surveyor, whose affidavits in which he had sworn: "*The following are dry and fit for cultivation, and are not swamp and overflown,*"—Tr. 19, schedule to p. 144—the character of the lands to which plaintiff objected, as follows:

"Before any testimony was given, plaintiff objected to any parol evidence as to the character of the lands, on the grounds:

"1. The defendant sets up no title in its answer, or claim of right to the lands.

"2. Parol evidence is not competent in favor of a party who has had an opportunity to give evidence before the officers of the Land Department of the General Government, and who has declined to do so.

"3. It is admitted by the pleadings that the defendant appeared before the officers of the Department on the application of the plaintiff to take up its list then on file in the office of the Secretary of the Interior, and declined to give evidence as to the character of the lands, and appealed from the decision of the Commissioner of the General Land Office to take up said list for examination, upon the sole ground of a want of jurisdiction in that officer to examine, allow, or certify the same, as appears by the notice of appeal and the allegations of the reply not denied by the defendant.

"4. Upon the ground that plaintiff's answer setting up title has been tried and adjudicated against it, both by this court and the Supreme Court, upon appeal.

"As to Mr. Cook's testimony, plaintiff objects to it, in relation to the payment of taxes, on the ground that such payment, if made, does not constitute a proper claim against the plaintiff in this case.

"These objections were not ruled upon, but reserved until the final consideration of the cause, and then overruled; to which defendant duly excepted." (Trans., p. 90.)

The witness said that he surveyed the lands in the summer of 1877, commencing June 8, being, in substance, as stated by him in his affidavits making part of the petition for a new trial. His testimony embraced all but one of the tracts described in defendnnt's petition for a new trial, as to which defendant's counsel said, when attention was called to it by the court: "*We don't claim that.*" (Trans., p. 119.)

His testimony and that of his assistants may be conceded, as to most of the lands, to have been to the effect that when they surveyed them they were not swamp; some of the tracts, however, in addition to those which the district court found to be swamp, were very close even in 1877. He had no knowledge of the county until he commenced to survey, and the others but a few years before. The testimony of Mr. Regan embraced *all of the tracts* surveyed by them; that of his assistants collectively did the same.

The district court found that of the tracts testified to by them, *thirteen* were swamp, but the supreme court reversed the judgment as to those as well, and even as to the *one*-forty that they said they did not claim.

The plaintiff had given its evidence as to the proceedings before the land officers, mainly in support of its reply. (Trans., 54, printed at length, beginning page 26, and extending with the exhibits to page 51), upon the idea as alleged in the reply that these matters would estop defendant from questioning the character of the lands, as now argued, but as the court did not then rule upon *any* of the questions raised, it called witnesses, who had been for many years familiar with the country, and proved by them that a very great change had taken place since its settlement, since 1850. Upon this question of fact we think there were many of the tracts which should have been awarded to the plaintiff, but

I am not bold enough to ask your honors to go over them, tract by tract, I choose rather except as to the few tracts found in our favor to put the case as I have done, that that was a question for the Secretary or the Commissioner, and not under the circumstances of this case for the courts.

The conclusions, which I think the authorities cited up to this point warrant, are these:

1. That the whole case is governed by the laws of the United States.

2. That the act being silent upon the subject of evidence, it rested in the discretion of the Secretary.

3. That as to this and the other counties for whose relief the act of March 5th, 1872, was designed, the duty was imposed upon the Commissioner without the right of appeal to the Secretary.

4. That plaintiff's list having been taken up for examination, and the defendant having been notified, that it could give evidence if it desired to do so, and having declined, and placed its claims upon the sole ground that the matter was *res adjudicata*, it is concluded by the *grounds which* it then took.

5. That whether plaintiff's proofs were or were not sufficient *prima facie* evidence of its rights, by reason of any irregularity, if the Government did not object nobody else could. If its evidence was sufficient before the Department, it was not only competent but sufficient everywhere, as to every one who had had an opportunity to contest it there.

That as defendant [illegible] had an opportunity to contest plaintiff's claims, and had actually done so upon certain grounds, and declined to do so upon others, its position was no *better* than it would have been before the land officers. That it followed that it could not impeach plaintiff's title

or proofs, before the courts, by any evidence which it might have given before those officers, but which it had declined to give.

These are some of the numerous forms in which plaintiff's counsel tried to secure the attention of the court from which the case comes here, to what he thought the material questions in the case. The grant had been made thirty years before, and the contest over the very list appended to plaintiff's petition had been carried on for nearly ten years, before the land officers. From the nature and source of the title claimed by plaintiff, it is plain that no decision *could* be made which would not involve and necessarily determine these questions. The district judge had considered them, and though his conclusion was against the plaintiff as to some of them, or it would have had no occasion to appeal, as to what the *issues* were, and what lands were in *controversy*, his finding was in its favor.

The opinion of the Supreme Court, if not silent as to all of these questions, in so far as it does take any notice of them, wholly mistakes the undisputed facts shown by the record, and gives no attention to those upon which the judgment then before it was rendered; it goes back to the original judgment and not only vacates it as to what had been tried, but dismisses the bill as to what had not been tried.

Tedious as this argument is getting to be, I desire to examine that opinion a little in detail:

1. All that is said about the accounting may be dismissed.

2. The plea that the lands had been taxed, so far as it was claimed to have the effect of an estoppel, requires no consideration, that court had decided upon the defendant's appeal from the order sustaining the demurrer to its answer in *this* case directly to the contrary (46 Iowa, 226) cited in the opinion, that question was *res adjudicata*.

3. All that relates to the proceedings to obtain a new trial,

in so far as those proceedings did not necessarily involve the merits, may be dismissed, and as to whether they did involve the merits, and whether the ruling presented a Federal question, I have already said all that I desire to.

4. What is stated as to the *statute*—Code, 3268—under which the court held the proceedings for a new trial to have been instituted I care to say but a word: The district court held that they were instituted under and governed by the sections of the statutes cited near the beginning of this argument. (Trans., p. 23.) The section cited by the court in terms makes it a matter for the discretion of the trial judge. He denied the application, and the court reversed his ruling, but without sending the case back to him, as was claimed by plaintiff's counsel, it ought to have done for the exercise of *his* discretion, the point of which is, that I claim, that a judgment—*our property*—should not have been taken from us without allowing us to be *heard somewhere* to protest against it. But perhaps, as the case stands, even that may not be a Federal question, though it seems to me it ought to be a question in any court where vested rights of property are disposed of.

5. The first *complaint*—not intending to take back what I have just said, however—which I wish to make, at least *in a very loud voice*, is that the court entirely ignored the facts stated in the record as to how the lands came to be selected in the manner that they were, how the Commissioner got his *special* authority to act in respect to this particular list, the law which required him to take it up, and the *issues* both before him and the district court upon defendant's application for a new trial. That it placed plaintiff and its counsel in a false attitude *from beginning to end*, that it overlooked or gave no attention to defendant's *admissions*, or its statements as to what it *claimed*, that facts which the record states again and again, and which defendant, so far as the record shows, had not

thought of controverting, are spoken of as not *proved*, and finally that it wholly ignored the elementary and most familiar rule, that titles derived from the United States, whether directly by congressional grant or otherwise, are governed by the laws of the United States and by those laws only, until the title of the Government is completely divested by the investing of a complete legal title in its grantee, and that as to this, the State and National Governments are independent of each other, and that it is for the Federal Government to say when and how it will part with its title, and the kind and sufficiency of the evidence required to show that it has parted with it. That in considering the effect to be given to the acts of the State and its agreement as to how the lands should be selected, the instructions of the Department in respect to it, its repeated and uniform rulings as to the effect to be given to the selections as evidence, it referred all these matters to a certain State statute which we had not mentioned, and under which we had never *dreamed* of making any claim. The only State statute which we did refer to, as we have done in this argument, was the one authorizing the Governor to provide for the swamp-land selections, and that not because we thought it gave him any power which the Federal Government or its officers were *bound* to respect, but because they *did* respect it and recognized his acts under it. These selections were made under the agreement, and whether regular or irregular, the act of March, 1872, made it the duty of the commissioner to take up the list, and to allow or disallow it. The opinion certainly does not *cover* the case, if it touches it, it is very lightly.

In view of the claim made by the State under this particular list from 1868, when it passed a resolution asking that Congress provide for its being taken up, (Rec., p. 123,) to 1875, when the Governor made a special application to the Commissioner to take it up under the act of 1872, that its agent, Mr. Harvey, selected this identical list as a test case, (Trans., p. 33,)

and pressed its examination for six or seven years; that the Commissioner *found it among the archives*, (Trans., p. 34;) that he transmitted this *original* list to the Secretary; that Congress finally, in response to the legislative resolution, passed an act requiring the Commissioner to take it up, and to allow or disallow it; that the Commissioner did take it up *by name;* that the defendant appeared there and opposed his taking it; that all the correspondence, including the letter of Mr. Steiger, one of its attorneys, to plaintiff's attorney in this case, related to this list, and this list only; that during all this time no question was made as to the *persons* making the selections, or as to how or by whom they were appointed, and, finally, that a copy was attached to the petition in this case, with the proper averments as to all of these matters, and which were not denied by the answer; that we went to trial, and that no question was there raised as to whether this was *the list* that had gone through all these circumlocutions; in view of all this *history* we think the objection that the persons making the selections were not regularly appointed, or that their appointment was not proved, as they now say it ought to have been proved, by the records of the *court*, if ever available, had been waived years and years before.

But we do not *go* to any statute in Iowa to see whether it makes the list evidence or not, or to determine whether the persons making it were *regularly* appointed or not. We base our claims upon the act of Congress making the grant, and the power which it gave the Secretary, his agreement, for so it has always been recognized and spoken of by all the officers, State and Federal; the statute giving the Governor authority, and, by implication, taking it from the county *court;* their appointment by the judge, at the Governor's urgent and repeated requests, and the subsequent recognition of the list, both by the Legislature of Iowa and by Congress, if, after all, that the whole thing can be defeated by an irregularity discovered by an appellate court at the end of a long litiga-

tion this class of land titles certainly rests upon a very insecure basis of i's and t's. All this applies, too, and with somewhat increased emphasis, to what is said in the opinion, to the effect that it was not shown that the list was ever *transmitted* to the Surveyor General. It *got* there; he had it, and made his marks upon it; it was found there, and removed to Washington, where the defendant's agents and attorneys saw and inspected it, and where they were notified by the Commissioner that it had been *filed*. (Trans., pp. 79, 80.)

The only thing that was not shown was the name of the person from whose hands the Surveyor General received it, and even that Mr. Harvey offered to prove—(Tr., p. 43)—or that he had actually endorsed it *filed*. Whether in the mind of the judge who wrote the opinion it turned upon a question of *pleading* or not, and the effect to be given to the last clause of the amended answer, (Trans., p. 57,) and whether, by *construction*, it ought to be held a denial of the allegation of the petition that Mr. Vandeventer, who, as defendant's vice-president and general agent, had charge both of its lands and litigation, meant to say that he knew nothing about it. I have no means of knowing.

It is true the judge who wrote the opinion says nothing about this, or about the *form* of the issues, and I think it is equally true that he wholly mistook the condition of the pleadings and what was in issue.

I say by construction, for this, if anything, is neither a general nor a specific denial, and if there is any intermediate class, of course the effect to be given to any particular pleading of that class can only be determined by construction, and if the pleading relates to a title derived from an act of Congress, I suppose, under the decisions cited, this Court will examine the entire record, including the pleadings, and that their proper construction is as much a Federal question as any other. First, it is a rule by statute in Iowa that allegations not denied are admitted. It is a rule, as I understand it, of universal ap-

plication, in courts of equity, that facts stated in the bill to be within the personal knowledge of the respondent, or acts personally done by him, are not put in issue by his saying that he has not sufficient knowledge or information to form a belief upon the subject. For example, it would not have been sufficient for Mr. Vandeventer, who had just sworn (Tr., p. 24) that he was defendant's vice president, and that he had charge of its lands and litigation, and who in this very answer says *he* received the notice referred to that defendant could appear and give evidence before the Commissioner if it desired to do so, to say that he had not sufficient knowledge or information to form a belief as to the truth of these statements. The paragraphs of the petition and answer in question are as follows:

PETITION.

"That notice of said application was duly given to the defendant's agents and attorneys by the said Commissioner, a copy of which is hereto annexed and made a part hereof, marked Exhibit A; that the said Vandeventer was the agent of this defendant, having charge of said lands, and, as such agent, appeared before said Commissioner and resisted said application, and the said refusal to take up and examine said list was wholly by reason of defendant's resistance thereto and its claim to said lands. * * *

"That said original list, a copy of which is hereto annexed, marked Exhibit D, after its removal from the office of said surveyor general—to wit, in the year 1866—at all times remained on file in said office of the Commissioner of the General Land Office, open to the inspection of the said defendant and its agents and attorneys, and was in fact inspected by them at the time of plaintiff's said application and prior to its said appeal."

ANSWER.

"And defendant further says that of the truth of no allegation in said petition as amended, or in the amendment to said petition, not herein or in the original answer to plaintiff's petition answered, admitted, or denied, has this defendant knowledge or information sufficient to form a belief."

Will this answer, by construction, be held to mean that Mr. Vandeventer intended to say that he had not sufficient knowledge or information to form a belief as to whether he was the same Vandeventer, or that he don't *know* whether he is or not, or, if he was, whether he was defendant's agent having charge of its lands and litigation; or, if he was, that he did not know and had no knowledge or information sufficient to form a belief as to whether he was before the Commissioner or not; or, if he was, that he had not sufficient knowledge or information as to whether he inspected the list then before him and made a part of the petition which he was answering? This is a sort of *reductio ad absurdam* or, at least, an absurd way of reducing it; but it is what it *comes* to and what cannot be avoided if this answer is held to put the otherwise unanswered allegations of the petition in issue. I have not gone in pursuit of authorities. The court said nothing about it, and, so far as I know, thought nothing about it; I rather think it did not, but it is all there is, in the record, that makes any issue upon what, other grounds relied upon by the plaintiff failing, will become an important question in the case. Perhaps it admits of debate, but it does not seem so to me that it does.

Pleadings like this, if there ever was just such a one before, have been universally regarded as nullities, presenting no issue and requiring no motion:

"A denial of sufficient knowledge or information to form a belief will not be held to apply to matters alleged to have taken place with the party or his agents, and if only so denied will, upon the trial, be taken as admitted (Bliss on Pl., 352, 326), and so the rule is well settled in equity as to denials by a corporation of what is alleged to have been done by its officers or agents, unless accompanied by a statement of facts excusing the want of knowledge in its present officers. A defendant must not interpose this form of denial in respect to acts done by himself, by *his agent*, or by his partner, without showing special reasons why he is ignorant of the matters alleged. (2 Wait's Pr., 423.) No motion to

set aside the answer is required; it is simply void, and raises no issue." (Humphrey *vs.* McCall, 9 Cal., 62.)

Besides the answer, to make any issue in this form of action, should show what title the defendant claims.

Greenwall *vs.* Duncan, 16 Fed. Rep., 35.

But, whether denied or not, they were abundantly proved, and if denied and not proved, still there remained nearly two-thirds of the lands about which there was no controversy in *any* form.

The opinion proceeds:

"That it is exceedingly inaccurate and unreliable is evidenced by the fact that, while it embraces 551 tracts, the defendant established, affirmatively and satisfactorily, that 398 of them were high and dry and fit for cultivation.

Mistakes are possible, and inaccuracies may occur in spite of the greatest care; for example, as so often said plaintiff's petition describes *five hundred and fifty-three* tracts. The defendant gave evidence as to the character of *one hundred and eighty-five* of these tracts, and no more. Mr. Regan, its surveyor, who was assisted at *different* times by three other persons, Mr. Petit, Mr. Deloss, and Mr. Cummins, testified to *all* of the tracts; the other three collectively did the same. The person who made the count *three hundred and ninety-eight*, not only included tracts described by them and not claimed by plaintiff's petition, *but counted the same tract as different tracts*, when spoken of by two or more of these witnesses, and upon *that* the judge, who wrote the opinion, based his conclusion that the list was *exceedingly inaccurate*. From this point on as the opinion touches no question and cites no authorities as to which we claim anything, it requires no review.

The property in controversy is of great value. The State has been for many years—but for some years past its officers have quite despaired of ever being able to accomplish it—

endeavoring to obtain for the benefit of the counties to which it granted the lands, what it was supposed was granted to it by the act under which plaintiff claims, and a controversy which was deprecated by Governor Lowe, in 1859, as *disastrous*, because it was not likely to be ended in six weeks, has lasted nearly thirty years, realizing the fears expressed by Governor Grimes, when, in 1856, he said:

"I have been fearful that the question whether or not a tract of land was really swamp and overflowed would not be settled in a single life time."

The record shows that there are a large number of counties similarly situated. My respect for this Court is infinitely too great to allow me either to expect or to apprehend that this controversy will be decided here upon any other grounds than those of its real merits.

What I think the fair *results* of this argument, and the authorities cited by it, together with such familiar principles applicable to the case as have been or may be assumed without argument, in epitome, are these:

I. That in all cases where title is derived from the United States the rights of the parties are to be determined solely by the acts of Congress under which they claim. That in this case the Secretary of the Interior was primarily to determine all questions touching the extent of the grant and what lands were of such a character as to be embraced in it, including the power to determine how that *fact* should be ascertained and the kind of evidence which should be received in respect to it.

That by the act of March 5, 1872, that duty as to these lands was imposed upon the Commissioner of the General Land Office.

II. That errors of law committed by these officers affecting the rights of private parties are subject to examination and correction by the courts. That upon all questions of

fact their decisions are final, unless the party complaining can bring his case within some recognized head of equity jurisdiction.

III. That in the absence of fraud, where both parties have been heard, or had an opportunity to be heard, the courts will make such decision, and such only, as, *under the laws of the United States*, should have been made by the officer whose errors are sought to be corrected.

IV. That as to the particular grant now here, when brought in question by a claimant under a grant precisely identical with that under which this defendant makes claim this Court held, in Railroad Company *vs.* Smith—

1. That the swamp land grant took effect *in presenti*, requiring to give it certainty only such proceedings as are prescribed by the terms of the act.

2. That it was the duty of the Secretary of the Interior to furnish to the States the proper evidence of their titles by making out the lists provided for by the act.

3. That the States could not be prejudiced by his failure to perform that duty.

4. That the title to any lands which were of the description embraced in the grant would not, and could not, be affected by any subsequent grant; that as against the railroad grants it was protected by express reservation.

5. That one claiming title under the swamp land grant must establish his title by *such evidence as Congress may have determined to be necessary, and by such evidence only.*

6. That parol evidence is competent only in favor of one who has had no opportunity to be heard before the land officers, or, if he had, who can bring himself within some heard of equity jurisdiction.

V. That where one claiming under an act of Congress has done all that he could do to perfect or protect his title his rights cannot be prejudiced by the faults or the neglects of the land officers.

VI. That in the absence of special grounds for equitable relief the parties are concluded, not only as to all the grounds of contest actually made by them before the land officers, but as to all questions properly within the scope of the inquiry, and which might have been made and decided there. That this rule applied to this case limits the controversy to the question of the legal sufficiency of defendant's grounds of opposition to plaintiff's claims made by it before the land officers.

VII. That if the last proposition is not correct, and under the *issues upon the trial of which the judgment appealed from* and now here was rendered, it was incumbent upon the plaintiff to make proof of the character of the lands claimed by it; such proof would be sufficient if of the kind required by, and made in accordance with the instructions of the land officers. That this defendant could not by removing the controversy from the tribunal where it properly belonged compel the plaintiff, at the peril of losing its rights, to give evidence in any other way or of any other kind than such as would have been held sufficient there.

It is submitted that the application of these principles to the facts of this case would entitle plaintiff to the relief prayed for as to all of the lands described in its petition.

GALUSHA PARSONS,
For Plaintiff in Error.

OPINION

OF THE

District Judge before whom the cause was tried.

OPINION

Of the District Judge Before Whom the Cause was Tried.

[The headings in brackets are my own.]

[*The Grant under which plaintiff claims.*]

On the 28th day of September, 1850, congress passed an act, by which all the swamp and overflowed lands made unfit thereby for cultivation, were granted to the states in which they were situated. The act made it the duty of the secretary of the interior to make out accurate lists and plats of the lands passing under the grant, and transmit the same to the governors of the states, and at the request of the governors to cause patents to be issued, which patents should vest the fee simple to said lands in the states, subject to the disposal of their legislatures. By act of February 3, 1853, the legislature of Iowa granted all the lands accruing to the state under the aforesaid act of congress to the respective counties in which they might be found, and plaintiff claims title to the lands in controversy in this suit under the said acts of congress and of the state legislature.

For some unknown reason the secretary of the interior failed to make any such selection and lists of swamp lands as the act of congress contemplated and required, and no patents have ever issued for the lands passing under that grant and lying in the county of Buena Vista.

[*The Grant under which defendant claims.*]

The defendant claims title under the railroad grant of May 15, 1856. That grant embraced all the odd numbered sections for a certain distance on each side of its road. Under this act all the odd numbered sections lying within the limits of the grant were certified to the state in 1858, as belonging to the grant of 1856, and after the completion of defendant's line of road in 1869, the governor of the state caused patents to be

issued to the defendants for all those lands. The plaintiff claims that these patents cover many of the lands inuring to it under the grant of 1850, and hence the controversy.

[*Plaintiff's selections and proceedings before the department.*]

Upon the passage of the swamp land act an understanding or agreement was had between the federal and state authorities as to the manner of selecting the lands granted. It appears from the evidence of plaintiff that the county court of each county in the state was to appoint three disinterested persons to make a survey of the lands in the respective counties, and from such survey and examination they were to make a list and plats of the lands found to be of such swampy character as contemplated by the grant, and return the same to the court. A duplicate of these lists and plats were to be furnished the surveyor general of the state, and upon his examination and approval, and in the absence of proof to the contrary the lands thus selected were to be taken as swamp, and patented to the state. Three persons were appointed, and made a selection of the lands in Buena Vista county. Lists and plats of the same were forwarded to the surveyor general at Dubuque, but under a ruling of the commissioner of the general land office promulgated about the time, that the grant embraced such lands only as were both "swamp and overflowed," the surveyor general failed to approve the list, but marked it "rejected because not in conformity with instructions from commissioner of the general land office." The ruling of the commissioner that lands to fall within the grant must be both swamp and overflowed was overruled at an early day by the secretary of the interior notwithstanding, which for some reason that we can only surmise, no notice thereof was ever given the surveyor general, and these lists remained in his office until it was abolished in 1866, when with the other archives of the office they were removed to Washington.

In the *meantime there being no proof* at Washington of any selections having been made of lands in Buena Vista county,

nearly the whole list of swamp lands were certified as belonging to the railroad grant and the commissioner after the arrival of the list in 1866 uniformly refused to take any action or recognize any right of the county or state to these lands as swamp lands. In March, 1872, congress passed a special act to "authorize and require the commissioner of the general land office to receive and examine the selections of swamp lands in Lucas, O'Brien, Dickinson and such other counties in the state of Iowa, as formerly presented their selections to the surveyor general of the district including that state, and allow or disallow said selections and indemnity provided for according to the acts of congress in force touching the same at the time such selections were made, without prejudice to legal entries, etc."

April 1, 1875, the governor of the state addressed a letter to the commissioner asking that the list of Buena Vista county be taken up under the provisions of this act of congress, and finally adjusted and settled.

In July, 1875, the commissioner of the general land office decided to proceed under the special act of congress of 1872, and take up the list of Buena Vista county, and examine and pass upon the same. He notified W. F. Steiger, the defendant's agent at Washington, of his proposed action, and informed him that he would be allowed to contest, and show if such were the fact, that the lands were not of a swampy character. Steiger, on behalf of the defendant, filed objections to the commissioner making any examination of the list for the reason — first, that the state was estopped from claiming the lands under the swamp land grant of 1850, having accepted and treated them as passing under the railroad grant of 1856, and, second, because the department had already certified these lands to the state for the railroad company, and having done so, all control over them by the department had ceased, and it had no jurisdiction to act further. The commissioner overruled these objections, and the defendant appealed from his

ruling to the secretary of the interior, who, on the 27th day of August, 1876, reversed the decision of the commissioner, and directed that no examination or certification of the lands should be made. The plaintiff, having thus exhausted its remedies before the department, files its bill in this court setting out the facts, and asking that a decree be entered in its favor, quieting its title to all the lands embraced in its list of swamp land selections to which the defendant still holds the legal title, and that an accounting be had for such of the lands as it has sold or otherwise disposed of. Upon the trial the defendant offered proof of the character of the lands and to this proof the plaintiff objects for the reason that the defendant not having objected to the sufficiency of the plaintiff's proof of the swampy character of the lands before the commissioner, and having refused to offer proof there, is estopped from raising that question in this court, and should be here confined to the trial of the issues made before the department. Other questions arose on the trial which will be noticed as we proceed. This somewhat lengthy statement of the case is necessary in order to have a full understanding of the questions decided.

[*Swamp land grant took effect in presenti and the duty of the secretary under the act.*]

It has often been held that the swamp land act was a grant *in presenti*, by which the title to those lands passed at once to the states in which they lay. To be sure the duty of identifying and patenting the lands was by the terms of the act imposed upon the secretary of the interior, but his neglect or refusal to perform that duty could not deprive the grantee of the benefits of the grant. The right of the state did not depend on his action but on the act of congress.

Having failed to perform the duty required of him by the act, the question arises, what are the rights of the county, and how are they to be asserted?

The rule that a special tribunal appointed for the purpose of hearing and determining a particular case or class of cases, has exclusive jurisdiction thereof has been so often decided that it will not be questioned, and the act of 1850, by committing to the secretary of the interior, all questions relating to the selection of these lands constituted him a special tribunal to administer the grant.

[*The jurisdiction of the courts.*]

If he had acted, it is clear that the courts would not take cognizance of the case except on some of the well defined grounds of equity—jurisdiction applicable to this class of cases—

1st. To correct an error in the construction of the law under which he is acting, or the application of some legal principle.

2d. In case of accident or mistake or of fraud practiced by or upon the officer administering the grant.

3d. When the rights of an adverse claimant have been passed upon in his absence, and without notice to him that a hearing was to be had.

When an act of congress constitutes one of the executive officers of the government a special tribunal to carry into effect the provisions of an act, it has long been the settled doctrine of the courts not to interfere with his administration of the law except in one of the three classes of cases above indicated. Where, however, the officer misconstrues the law under which he is acting, or in case of accident or mistake, or of fraud on the part of such officer, or by one of the litigating parties, or where the rights of one claiming an interest in the grant have been determined without awarding him a hearing, it would be manifestly unjust and inequitable for the courts to refuse to hear his grievances or to award him the relief to which he shows himself entitled. It has, therefore, been the settled policy of courts of equity to entertain cases coming within any of the foregoing classes, and upon a full hearing of the parties

to determine and award to each that relief which equity and good conscience demands.

While this is a settled rule of practice another equally as well established exists. It is that the courts will not review the findings of facts or these special tribunals, where the parties have been awarded a fair and impartial hearing, but such findings are as conclusive upon the courts as upon individuals; and this is manifestly right and just. Nothing could be more proper than to submit to the officers of the general land office all questions of fact necessary to be known to a proper administration of an act of congress making a grant of land, but nothing could be so ill advised as to entrust to them the determination of questions of law arising under the act. They are generally men of intelligence in the ordinary business of life, but not trained by study or experience to the habits of investigation required of judicial officers. They are good material for juries to determine questions of fact, they are not fitted for judges to pass upon difficult and intricate questions of law.

Starting then with the doctrine fully established that this court has jurisdiction to hear this case and grant appropriate relief, we will examine some of the legal questions presented.

[*Effect of certification under the railroad grant.*]

It is first insisted by the defendants that the lands in question having been certified by the commissioner of the general land office as passing to the state under the grant of 1856, that this is a determination that the lands are not of the kind and character contemplated by the swamp land grant of 1850. In other words, it is contended that the decision of the commissioner that the lands are included in the grant for railroad purposes, is a finding on his part: that they are not of a swampy character and are not included in the swamp land grant of 1850. Admitting this to be true, still as it is shown that the county never had a hearing upon the question of the character of these lands, that the department officers have at all times

refused to examine its list of swamp land selections, it falls within the class of cases, where the decision of the officer was made without giving the claimant its right to a full and impartial hearing, and an examination of its proofs. The department of the general land office having failed or refused to do this, the court will entertain its petition and award to it such of the lands as it ought to take under the grant of congress.

[*Plaintiff's claim as to the effect of the commissioner's decision to take up its list under the act of March 5, 1872.*]

On the other hand it is claimed by the county that the commissioner has decided, that it has furnished *prima facie* evidence of the swampy character of these lands, and that this finding is conclusive and final for two reasons:

First. That the act of March 5, 1872, conferred upon the commissioner the exclusive authority to allow or disallow the counties, selections; and

Second. Supposing his authority not exclusive and that an appeal would lie from his decision to the secretary, still, as the appeal taken, was not from his finding as to the sufficiency of the proof, but only as to his jurisdiction, his finding as to the sufficiency of proof stands unreversed and unquestioned.

We will examine the second reason first, because it assumes that the commissioner has passed upon the sufficiency of plaintiff's proof and held it sufficient. This decision, it is claimed, was made by the commissioner in his letter of July 7, 1875, addressed to W. F. Steiger, the defendant's agent and attorney at Washington.

A careful examination will, I think, satisfy the reader that no decision of this kind was intended to be made by the commissioner. He says: "The state has long since claimed the "land in question as swamp land and furnished *prima facie* evi- "dence that they are of that character," but immediately following the above he adds: "This claim has not yet been "examined by this office, and until it is so examined and either

"rejected or approved the duty of this department is not per-
"formed;" and further on he adds: "I conclude, therefore,
"after a careful examination of the whole subject, that unless
"the state authorities shall formally abandon the claim of the
"state, this office has no right to refuse to make the investiga-
"tion in regard to the swampy character of these lands, and if
"any of them are found on examination, to be of the descrip-
"tion of lands granted to the state as swamp and overflowed
"lands it will be the duty of the department to cause the same
"to be certified, and on the request of the governor patented to
"the state as such." The whole letter taken together makes it plain that the commissioner decided and intended to decide, merely that he had no right to refuse to examine the proof offered by the county and that if that proof satisfied him of the swampy character of the lands to certify them as such.

That congress, by the act of March 5, 1872, intended to change the method of procedure in the interior department, divest the secretary of authority in the matter of these swamp selections and confer exclusive jurisdiction over the same in the commissioner I cannot believe. To so hold would be to hold that the act of 1872 repealed all former laws of congress confiding those matters to the secretary. The evident intent and purpose of the act was to require the commissioner, whose duty it was in the ordinary course of business in the department, to first act on these lists to perform that duty, it was intended to set in motion the machinery of the department, and to compel action by the officers in charge, who had prior to that time refused to pass on these lists.

[*Was the defendant estopped by the grounds upon which it resisted the taking up of the plaintiff's list before the commissioner?*]

Upon the trial of the case, the defendant offered evidence to show the character of the lands in dispute, and this evidence very clearly establishes that by far the greater part of the lands concerning which *evidence was offered* are not and never were swamp lands. The plaintiff objected to the introduction of this

evidence mainly upon the grounds that the defendant can only contest the question of the character of these lands before the officers of the general government, and having had the opportunity to offer this proof there, and declining so to do, cannot now be permitted to litigate the question in this court; and, second, because of the defendant's placing its objection to the allowance of the list by the commissioner on certain *specified grounds (the want of jurisdiction)* is now estopped from questioning plaintiff's right of recovery upon *other or different grounds.*

The plaintiff's counsel argues with great force and earnestness that the same rules apply in trials before the department officers that obtain in courts of law; that each party is bound to present his whole case and litigate all questions which properly appertain to the case, and that he cannot be afterward heard to make a new or different defense. It is argued further, and there is force in the suggestion, that the department officers were specially appointed by the act making the grant to determine all questions relating to the character of the lands claimed by the grantee, *and that the kind and sufficiency of the proof were matters which congress left to the judgment and discretion of the secretary*, that if an adverse claimant could procure a decision from the department refusing to hear the parties, and transfer the case to the courts it would take from the *federal government the power to prescribe, not only the tribunals by which its grants shall be administered, but the manner of their administration and the character and sufficiency of the proofs upon which they shall act; that its effect is to transfer from the jurisdiction of its own executive officers to a jurisdiction which may be hostile to the motives which actuated it in making the grant, and the purposes sought to be accomplished by it, or which may be directly in the power of its grantees, and likely to be influenced in its action by what would be favorable to them.* It is insisted that the very question which the defendant now asks to try was open to it before the commissioner; congress appointed him as the person before whom the proof should be made. It was invited to give evidence, if it

had any: it declined to do so, and instead procured a decision that the commissioner had no jurisdiction to hear the case. The defendant, by its conduct, said in effect, we will not try this case where the law says it *shall* be tried; we will not give our proofs where the law says they shall be given if at all, but will go where the law says they shall *not* be given, and will try the case where the law says it shall not be tried. This line of argument by the plaintiff is based upon two propositions which it assumes have been established:

First. That the proofs filed by the county were sufficient to entitle it to the land in the absence of other proof controverting it, and

Second. That the defendant is *responsible* for the decision of the secretary that the department had lost jurisdiction of the question.

For the purpose of this case we may assume that the proof offered has established that there was an agreement made between the secretary of the interior and the state authorities that the selections of swamp lands in this state should be made by disinterested parties to be appointed by the county court in each county, that their list of selections should be certified to the surveyor general, who after examination and approval should report them to the department, when patents were to issue *unless adverse claimants furnished* satisfactory proof that the lands were not in fact swamp. Assuming that this agreement was made and that the state faithfully performed its duties under it and has done all that it could do to secure its title, still it is apparent that the lists *were never approved by the surveyor general*, and the land never certified to the state as inuring to it under the swamp land grant. It must be apparent that these selections and *ex parte* proofs are of no avail to establish title in the plaintiff because the lands were never selected nor the selections approved by any competent officer of the land department, and until approved by the secretary they could avail nothing even against the government.

As to the second ground, that the defendant is responsible for the ruling of the secretary, that he had no jurisdiction to hear this case because the lands by being certified as passing under the railroad grant ceased to be public lands, I think the ground untenable. There is no suggestion that this decision was procured by fraud or false testimony on the part of the defendant, or that it was in any respect collusive. To be sure the point was raised by the defendant, but it can make no difference it seems to me whether the ruling was made at defendant's instance or upon the secretary's own motion. It must be presumed that all tribunals act upon their own independent judgment, and that their decisions when made are *their* decisions and that they alone are responsible for it. It is also to be presumed that it would refuse to entertain jurisdiction whether the point was raised by the parties or not. The only logical view that can be taken of this case is that the secretary refused (no matter at whose suggestion) to have the case heard in his department, so that instead of being allowed and invited to controvert plaintiff's proof as to the character of this land the fact is that both parties were refused a hearing, and the defendant was not *permitted* to contest the plaintiff's claim, and this was for the reason that the secretary was of the opinion that his department had *no jurisdiction*. He knew, of course, as well at the inception of the proceedings as at the end what the law was, and it is to be conclusively presumed that he would have refused a hearing which he considered he had *no authority* to entertain. It is therefore erroneous to say that the question of the character of the lands could have been litigated before the land department. The secretary directed the commissioner to proceed no further and he was bound to obey.

[*Defendant may contest the character of the lands before the courts* BECAUSE *by the decision of the secretary upon its appeal it was denied the opportunity of doing so there.*]

If this view is correct, and I am very confident it is, the defendants never had a legal opportunity to contest the character

of the lands before the department. The parties never reached a stage in the progress of the case when testimony was admissible and the question of fact as to the swampy character of the lands was never presented to or passed upon by the department officers, but as matter of law the secretary held that the plaintiff had no right to present its proofs or to be heard. That this holding was erroneous there can be no serious question, and it only remains for this court to determine how the error may be corrected and the rights of the plaintiff protected.

So far as I have been able to discover there is no case to be found in the books where a court of equity has found the ruling of the land department to be erroneous, on a question of law, and has *remanded the matter again to that department for hearing*, but in every such case it has heard and determined the rights of the parties, and rendered a decree awarding the lands to one or the other party upon the merits. *It tries the case de novo both as to matters of law and fact.* It hears and decides the case as the department ought to have done.

But from the very nature of the case and the principles involved, we should reach the same conclusion from another line of reasoning.

Courts of equity take cognizance of these cases only to protect the party in his rights, which have been denied him by the department officers. Until a showing is made that his rights are denied him there, that he is being deprived of his property through the illegal acts of the officers of the department, he can have no standing in a court of equity. He seeks the courts, and its doors are opened to him to protect him against *an undue advantage obtained by his adversary, not to give him an undue advantage in turn.* When the court in the exercise of its authority to do equity awards him that of which he was unjustly deprived, he cannot and ought not ask that it do his opponent a worse wrong than that which he appeals to the court to correct.

Before the land in suit could pass to the plaintiff, under the

swamp grant, it must be *established* to be swamp, and this essential fact congress left to the secretary of the interior to ascertain, and not to the grantees. The secretary has failed and refused to certify the lands or to take any action on the claim. In this state of the case a court of equity has jurisdiction to grant relief if the necessary facts are shown, but can grant no relief whatever except that the lands were at the time of the grant *in fact swamp or overflowed lands, and that the plaintiff, therefore, has a just and equitable right to them.* If the lands are dry and tillable, of such a character as not to be included in the grant, it would be a wrong to defendant to compel it to surrender them, equally as great as to withhold from the plaintiff such as are swamp and passed to it under the grant.

[*What of the lands in controversy are swamp and what are not.*]

As to such of these lands as are not swamp the plaintiff has suffered no injury by the refusal of the secretary to certify them, and has no grievance to complain of, no wrong for the court to correct. Those that are shown to be of a swampy character belong to it rightly and legally, and the court ought and will protect it in its title. More than this it cannot ask: further than this court cannot and ought not to go. A decree will be entered quieting the plaintiff's title to four hundred and eighty acres of the land *in dispute* which the evidence shows was of a swampy character in 1850, and to about six thousand acres concerning which no proof was offered, but which the defendants have *tacitly admitted were swamp.*

This disposes of the case with the exception of the cross bill filed by the defendant, asking that in case any of the lands are found to belong to the plaintiff, that it may recover the taxes paid thereon.

It is well settled that where lands are taxable and one not the owner, and with no color of title voluntarily pays the taxes due thereon he cannot recover them back. Such, however, is not this case. The swamp lands of the county are and were

the property of the county, and as such are not taxable, no taxes should have been assessed or collected thereon. The county, by assessing and taxing them, has received a revenue to which it was not entitled, and which it should not have collected or received. For this reason the taxes should be refunded with six per cent. interest from date of payment.

Judgment and decree accordingly.

ED. R. DUFFIE, *Judge*.

112-165

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 57.

THE COUNTY OF BUENA VISTA, IN THE STATE OF IOWA, PLAINTIFF IN ERROR,

vs.

THE IOWA FALLS & SIOUX CITY RAILROAD COMPANY.

In Error to the Supreme Court of the State of Iowa.

GALUSHA PARSONS,
For Pl'ff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 57.

THE COUNTY OF BUENA VISTA, IN THE STATE OF IOWA, PLAINTIFF IN ERROR,

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THE IOWA FALLS & SIOUX CITY RAILROAD COMPANY.

In Error to the Supreme Court of the State of Iowa.

REPLY FOR PLAINTIFF IN ERROR.

If silence may be taken for consent, as counsel makes no attempt in his argument now on file to *defend* the judgment of the supreme court of Iowa, by which it dismissed plaintiff's bill *in toto*, instead of as to what remained of the 185 tracts testified to by defendant's witnesses, after deducting the *one* tract, which defendant disclaimed, as the evidence proceeded, (Trans., p. 119,) and the *thirteen* found by the District Court to be in fact swamp, as shown by its witnesses, in other words, except as to 171 of the 553 tracts claimed, this reply, I suppose, ought to be limited to those lands as the only lands actually and substantially in controversy. I shall venture, however, in as few words as may be consistent with fullness of response, to examine the propositions submitted by him, and in doing so shall follow the order in which he has presented them.

I.

First. At the beginning, page three, counsel says:

The suit was brought under the provisions of the statute of Iowa, section 3273–6.

Not at all. We now disclaim, and at all times have disclaimed, going to the statutes of Iowa at all as the source of our rights. We place ourselves squarely upon the act of Congress making the grant, and the decisions of *this Court*, that when the land officers have refused to do their duty, or have given to one man the property that rightfully belongs to another, the courts will, upon the proper foundation being made for invoking their jurisdiction, grant the appropriate relief, not because there is some State statute that so provides, but because, as this Court has said, *it is of the very essence of judicial authority*, and the difference between counsel and myself and the supreme court of Iowa and myself is because they insist upon our referring our rights to one source, while we insist upon referring them to another. The supreme court of Iowa has assumed and very stoutly maintained in the course of this litigation that if there were no statute in Iowa giving a remedy, a party situated precisely as this plaintiff is would be entirely without remedy, while I have maintained exactly the contrary, and held up the decisions of this Court in support of what I have maintained.

In a sense, it may be *quieting title*; but it is because we have the authority of this Court for asking what we claim, and not because there is a statute in Iowa upon the subject of *quieting titles*.

Second. Counsel's claims as to Plaintiff's selections and proofs as evidence.

As said in the original argument, we claim nothing under section 927 of the Revision of Iowa, referred to by counsel

and by the Court. What there is of *that* comes from the Court and the other side. The Court, in its opinion, said we *could not* claim under *this* section. Defendant's counsel says now we *cannot* so claim, and *we admit it*. Probably that ought to be sufficient to take that statute out of the debate. The Court, however, refers to it as the source of the county judges' authority, or rather the authority of the county *court*, to appoint agents to make and report the selections. We, upon the contrary' disclaim all such pretensions, and say the authority, if any, is to be found in, or implied by, *the act of Congress making the grant*, and constituting the Secretary of the Interior a special tribunal for carrying it out. So much comes directly from Congress. The next step relied upon by us is the *instructions* of the Commissioner of the General Land Office as to how the selections should be made where the States declined to accept the *field notes* of the Government deputy surveyors.

It is conceded that the State of Iowa did so decline. The first instructions, November 21, 1850, less than two months after the passage of the act, are at page fifty-eight of the transcript. So far as material to this question, they are to the effect that the State must furnish *satisfactory* evidence, and that the *affidavits* of the county surveyors and others making the selections should be held *sufficient*. This was more than two years before there was any statute in Iowa upon the subject. There was a great deal of correspondence, but that it was so *agreed* is as much a historical fact as the admission of the State of Iowa into the Union. Without going again over the correspondence, it fully shows how it was made, how it was recognized, always without question, and how it had been acted upon for nearly thirty years. The land officers of the Federal Government recognized neither the counties nor the railroad companies; they adjust these grants only with those having authority to represent the *State*, and we suppose it to follow that whatever would be held binding between the General Government and the State, must, until

the final and complete adjustment of the grants, bind those claiming under the State; or, said in better form, claiming a right because of some privity between themselves and the State as to either grant, to put themselves *in the place of the State*. Besides, this act, which both the court and counsel insist upon it we *shall* claim under whether we want to or not, had for its principal purpose the *disposition* of the lands and the carrying out of the system of drainage and improvements contemplated by the grant, and for that purpose and none other provided for plats, which I mention only because counsel and the court have done so.

The statute that we *do* claim something under, and which was in force when our selections were made, is the act of January 25, 1855 (Trans., p. 61), authorizing the *governor* TO PROVIDE FOR THE SELECTION OF THE SWAMP LANDS his circulars to the county judges, urging upon them to take immediate action in the matter, the appointment by the county judge of this particular county of the persons who made these selections, and the recognition in express terms of the lists of this particular county by the General Assembly (Trans., p. 123); by Congress in passing the act of 1872, so often referred to, by the governor in asking to have this particular list taken up, (Trans., p. 44), and by the six or eight years of daily recognition, during all of the time that Mr. Harvey was endeavoring to procure action upon it, including the notice of the Commissioner to this defendant's vice-president and general land manager, that it was *about* to be acted upon, and to its land commissioner that it had been *filed* in his office, and *placed upon its records* (Trans., p. 79). In short, we refer all of our rights, if we have any, to Congress—the laws of the United States, and what has been, and what *ought* to be, done under them, and refer to the State statutes so far, and so far only, as Congress or the Federal officers have recognized them, or what has been done under them, while counsel and the supreme court of Iowa insist upon it that we shall claim under the

laws of Iowa, and that if they do not give us what we ask we are not entitled to it all. And so we have the issue sharply cut and exactly defined; whether in the disposition of the public lands of the United States the rights of parties, *until the title of the Government has been completely and totally divested*, are governed by one or the other of these sets of laws. Of course the supreme court of Iowa would not state it in that way, but their conclusion can only be maintained by placing it there.

THIRD. *Counsel proceeds: The Supreme Court also held and decided that the State statute did not provide that the lists should be evidence.*

This is but carrying out the same fundamental and radical error, and does us two-fold injustice: first, that we *shall* claim what we say we will *not* claim, and will not be compelled to claim; and, second, what we admit if we did claim, we would be wrong about it, at least as to this particular section. We say the lists were evidence, because they were the evidence required by the Secretary of the Interior, who, by the necessary implication of the grant, had the power to say what evidence, if any, should be required, and that they would have been equally competent before him or the Commissioner, if the State had never said anything about it, one way or the other; and, second, because the State has said something about it, has authorized its chief executive officer to take such steps as *he saw proper*, and he has taken *those* steps, and because they have been recognized both by the law-making and law-executing powers *all round;* and, third, that the kind of evidence can't be changed by changing the place of trial, from a tribunal that has jurisdiction of the entire subject-matter, to one that takes its jurisdiction only because the other has failed or refused to do its duty; that as to this particular question, the defendant, upon whose plea the decision, by which we were denied a hearing where we ought to have had it, was made, is in no better position than

it would be if it were plaintiff. In other words, because the rule which confines us to the questions which we raised, or offered to raise, before the special tribunal, when we come into court, applies to it to that extent, when it is brought into court. In the language of this court, more than once, it is bound by the election it then made.

If the supreme court of Iowa and counsel are right, the State courts, in this class of cases, would be governed by one set of laws, and the Federal courts by another; and that is what I regard as the *germinal* error of that court in this case.

If I were to refer the question of their admissibility in evidence to any statute provision of Iowa it would be to these:

1. An act of the General Assembly, as follows:

SECTION 1. *Be it enacted by the General Assembly of the State of Iowa*, That so soon as the examination and survey of the swamp and overflowed lands in any of the counties in this State shall be completed by the county surveyor, or other person appointed for that purpose, a full and complete return of the same shall be forwarded to the secretary of State, whose duty it shall be to report the same to the surveyor general.

Laws of 1853 Rev., sec. 951; Trans., p. 60.

[The office of *register of the State land office* was not created until 1855. Prior to that time the duties properly appropriate to that office were performed by the Secretary of State.]

2. CODE, *Section* 83—Act creating the office:

The register of the State land office shall keep his office at the seat of government. The books of said office shall be so kept as to show and preserve * * * *copies of the original lists furnished by the selecting agents of the State*, and all other papers in relation to such laws as are of permanent interest.

Section 84. Separate tract-books shall be kept for the * * * *swamp lands.* * * *

Section 86. * * * The documents and records therein shall be kept subject to inspection, * * * and *certified copies thereof*, signed by said register, with the seal of his said office attached, *shall be deemed presumptive evidence of the facts to which they relate*, and, on request, shall be furnished by the register for a reasonable compensation.

[For register's certificate to this list see Trans., p. 142.]

Section 3702. Duly certified copies of all records and entries, or papers belonging to any public officer, or by authority of law filed to be kept therein, shall be evidence in all cases, of equal credibility with the original record or papers so filed.

In view of these statute provisions as a mere matter of local law, I have never been able to understand how the Court held that this list was not competent *presumptive evidence;* but the opinion makes no allusion to any of these provisions, but refers the whole matter to Revision section 927, under which we made no claim, and to which we made no reference.

I suppose the lists and proofs would have that effect upon *general principles* applicable to all executive officers or public agents upon whom specific duties are imposed, and who are required to make a report or return of what they have done, and especially when that report is required to be made upon oath. But in this case I have chosen to place it mainly upon the act of Congress making the grant and the duties which it imposes upon the Secretary, the universally recognized rule that when a duty is imposed, and the act is silent as to the *means*, that they are in the discretion of the officer, and the fact that these selections and proofs were made in pursuance of his instructions, their subsequent recognition, and the fact that they have never been questioned from that day to this, except by this defendant in its application for a new trial, and the proceedings since that time. It was no part

of my original purpose to cite authorities as to when public documents are competent, or the effect as *evidence* to be given to the official returns of public officers or agents, but in view of what is said in the argument of counsel as to the general law, I beg to call your Honors' attention to the following decisions of this Court.

Printed volumes of the American State Papers, even when they purported to be copies of copies, and the originals unsworn, were held competent evidence in Bryan *vs.* Forsyth, 19 How., 338; Gregg *vs.* Forsyth, 24 *id.*, 180.

The *recitals* in State papers of particular facts were held presumptive evidence of the truth of those facts, in Watkins *vs.* Holman, 16 Peters, 55, and that not as if it were a new question and one open to debate, but as familiar and settled law.

United States *vs.* Breward, *id.*, 147.
United States *vs.* Low, *id.*, 166.
Buckley *vs.* United States, 4 How., 258.

In Galt *vs.* Galloway, 4 Peters, 342, it is said that the records of the land office are always competent evidence.

Hedrick *vs.* Hughes, 15 Wall., 126.
Hansick *vs.* Barton, 16 *id.*, 172.

In Best *vs.* Polk, 18 *id.*, 119, this court held copies of papers and records competent under a statute not distinguishable from that of Iowa.

Of course, to all this it will be answered that this Court follows the State courts in the construction of these statutes, and that the supreme court of Iowa held that this list was *incompetent*, which implied a construction of these statutes. The inference is undoubtedly directly contrary to the fact. However that may be, the argument remains that their admissibility upon the question of this Federal title depends upon Federal and not upon local laws, a thing that had not been questioned from Wilcox against Jackson, so far as

I know, until the supreme court of Iowa silently overruled what is there said, by their decision in this case. In that case this court said, quoting from memory, that for the Federal courts to be governed by the laws of the States as to the evidence upon which the titles of the United States should be divested would be to make the State laws paramount to those of Congress in relation to a subject confided by the Constitution to Congress only.

FOURTH. *Counsel proceeds: The Supreme Court held that there was no proof that the list in question was ever* TRANSMITTED *to the Surveyor General, or that he ever had an opportunity of passing upon it.*

It did *say* so; but, in saying so, it, in fact, entirely overlooked the issues. My ideas are fully presented in my original brief. Counsel makes no attempt to show *how* such an issue was made, either as the issues originally stood, or as made up, upon defendant's application for a new trial. I *think* I showed how the allegations of the petition in this respect were *not* put in issue. Second. No such *objection* was made to the list when it was offered and *received* in evidence by the District Court. The objection that was made was: *It is not shown that said selections were ever* FILED *in the proper offices.* (Trans., p. 76.) This objection was manifestly suggested by what was said by Delano, Secretary, in his ruling rejecting the list, namely: *There is no proof that the list of selections made by said county was* FILED *in the office of the Surveyor General.* (Trans., p. 42.) What is said by Wilson, Commissioner, in transmitting the list to the Secretary, *id.*, pp. 33, 34, and by Mr. Harvey, *id.*, p. 43, in his offer to supply this proof, shows what *marks* were upon the list and that it was not marked FILED. What follows this particular objection and throughout the whole course of the trial, the controversy was not as to whether this was the list which was *before* the officers or that was *in* the different officers' hands, the Commissioner of the State Land Office, the Sur-

veyor General, the Commissioner of the General Land Office, and the office of the Secretary of the Interior; but as to how they had *treated* it; that they had, as then claimed by counsel, refused to give it recognition by refusing *to file* it. The *paper* read was the one attached to the petition to which all of its averments related, and which was referred to in *all* of the pleadings. (Trans., p. 129.)

To continue the discussion of this question would be but to repeat what I have said in my original argument. I have there maintained that this court, in a case arising under the laws of the United States, is no more bound to follow the rules of the State courts as to matters of pleading or evidence than it is as to the ultimate questions in the case; and if I thought your Honors could read this record and believe that either the making and reporting of the selections was put in issue, or that defendant's officers and attorneys intended to deny that they saw the list and proofs in the hands of the Federal land officers after they were reported, or that this is not the list, to which all of the Legislative acts and resolutions, and all of the correspondence and controversy set out in the record relate, I should quite despair of ever being able to prove *anything* so that it would *stand* in an appellate court.

Besides the line of thought upon this subject, of the judge who wrote the opinion, that the allegations of the petition did not relate to the list which was made a part of it, for that is what it is in substance, was entirely *original*, there is nothing in the case to show that either defendant's counsel or the judge of the district court had ever taken that view of it. On the contrary, the *whole case* the entire course of the trial carries the strongest implication that this was the list that we were all talking about, while the district judge in his opinion states as an undisputed fact that it was reported to the surveyor general.

I pass counsel's second point, as it relates to matters fully discussed by me in my original argument.

II.

Under his third point counsel says:

First. There was no *agreement* as to the manner in which the lands should be selected. It is certain there was no formal agreement like a deed *inter partes*, but I think it is equally certain that your Honors will not refuse to recognize as an *agreement*, however evidenced, what the legislative and executive branches of both Governments, the latter for more than thirty years, have recognized and acted upon as an agreement; but even if that failed, we would still be acting under the *instructions* of the special tribunal to which the administration of the grant was committed.

SECOND. *Counsel says: The power and authority of the State selecting agents are derived from the statute above quoted.*

That is simply a reassertion of what I regard as the fundamental and pivotal error in the whole matter. If what is claimed by counsel upon this and the other questions throughout the case can be maintained, then of course our rights do come from the State, and we must look to the State laws and the State courts for their protection; but if what I maintain and now submit without further argument is true, we are under the protection of the laws of the United States and *this is the court for us.*

THIRD. *The forms submitted.* (Trans., p. 73.)

That was two years *before the passage of the act authorizing* the Governor to take charge of the business. Of course up to that time the county court or the county judge did have charge of the business, and there was no State law about it, except the act of 1853. But our list is *not* so headed, and does not purport to be made under that or any other statute of Iowa. (Trans., p. 30, Ex. A.)

FOURTH. At pages 10 and 11 counsel says: *The Department regulations are only binding upon the Department.*

I understand that as to matters primarily within their jurisdiction the settled law to be right the other way, and that regulations or instructions authorized by law have the force of law, everywhere. The cases cited in my brief, I think, support this position. Besides, this Court said in Railroad Company against Smith, that as to parties not *exceptionally* situated the evidence must be such as is required by Congress.

III.

Counsel's fourth point, page eleven:

The witnesses named, plaintiff's surveyor and his assistants, made their survey *twenty-seven* years after the grant. The plaintiff's witnesses show that very great changes have taken place in consequence of the cultivation and improvement of the country. The Department has recognized that, again and again, as to the whole country, and uniformly requires that the evidence should relate to the time of the grant or to a time when there had been no material change from such causes. Ours was made when the county, and, indeed, all that part of the State, had but very little population, and when there had been no material change. Even defendant's surveyor recognized that he had got to do a great deal of guessing when he said:

"As to my survey, it is all correct beyond any doubt, but in my selecting land to survey, I used my own judgment to know how far I ought to keep from the overflow, and I was very cautious to leave out some good land rather than take in bad; I was more merciful to the poor county than to the corporation."

(Trans., p. 105.)

Out of 553 tracts he selected but 185 that he claimed to be dry enough for cultivation *or meadow*, and the ruling has uniformly been by the Department that the test is whether the

land is fit for *cultivation*, and not whether it is fit for meadow. Instead of this evidence showing that our lists were fraudulent, I submit that if his testimony had related to the time of the grant, all of the tracts which he described as fit for *meadow* only would have been held by the *Department* to be swamp or wet within the meaning of the grant. Counsel says nothing as to the fact that the court took from us the 379 forties, which their surveyors "in their mercy to the poor county" did not claim, and which were not included in their list. I would be glad to hear a defence of that part of the decree. The very improvements named by counsel have changed the whole face of the country, from one of ponds and sloughs to one comparatively dry.

These are the questions which they had an opportunity to try in the way and by the kind of evidence required by the rules of the Department. Having declined to controvert our proofs there, we think we have a right to object to their being heard upon that question here.

Counsel's fifth point is fully covered, according to my ideas, as to what would be required to cover it, by my original argument. As to what is said under his sixth, or elsewhere in his brief, as to the Surveyor General's duty in these cases, as to the States declining to accept the Government surveyor's field notes, the selecting agent's affidavits, if in accordance with the Commissioner's instructions, were to be, and always have been, held *prima facie* sufficient, and the Surveyor General *had no discretion in the matter*.

The instructions and correspondence contained in the record show that he *was required to report them*, and that the original instructions as to comparing with the field notes was done away with more than thirty years ago.

As to what is said under the seventh head, I have given my reasons in the original argument for supposing that to vacate a judgment when it relates to land titles derived from the General Government, and sufficient reasons are shown why, under the laws of the United States, it should not be

vacated, is not a *mere* question of practice. But this judgment never was vacated. I think it is not putting it too strongly to say, that not only the issues, but the whole course of the trial, show that it was an admitted fact that defendant at most was only entitled to have it modified, vacated as to the lands described in its *true list*, that that was what it was *asking* for. When the supreme court went beyond that, it not only mistook the issues and took original jurisdiction of a matter that had not been tried in the district court, *but exceeded defendant's expectations* in the liberality of what it gave it.

Counsel says something to the effect that it was only the *seventh paragraph* of the second division of its original answer that was out of the case by the demurrer. By statute in Iowa, Code, section 2657, it is required that pleadings in equitable actions shall be separated into *divisions*, and by section 266 each division is required to be divided into paragraphs, but a demurrer will not lie to a single paragraph; it must go to the whole division or it will, upon motion, be stricken from the files (section 2649). This demurrer was in these words:

> Now comes the plaintiff and demurs to the *second division* of defendant's answer, and for cause of demurrer says the same does not state facts sufficient to constitute a defense to this action.
>
> Which demurrer was sustained as follows:
>
> Now on this 14th day of November, 1876, the demurrer to the *second division* of the defendant's answer is sustained and defendant excepts. (Trans., p. 6.)

This form of demurrer is authorized by statute, Code, section 2664, and it goes only to the *merits* of the pleading to which it is addressed. But if counsel claims that the demurrer was *overruled* as to the other paragraphs of that division, although I have taken a different view of it, I would be very glad to have the opinion of this Court as to whether it *should* have been overruled, there being no allegation in that division

that the lands were not of the *description* alleged in plaintiff's petition. Besides, when the case was before the supreme court upon defendant's appeal from the order denying it a new trial, (46 Iowa, 663,) the court said, of course, it could not have the effect to open any matter already adjudicated, that *other matters were pleaded, namely, that the lands were not, in fact, swamp, which if established is a sufficient defence.*

Counsel says, too, under this head of his argument, (page 16), that the ruling of the secretary, that the lists and proofs were *prima facie* evidence that the lands were swamp, was not specially with reference to this list. That is simply a mistake; it is true there were and still are thirty-seven other counties in Iowa, *similarly situated*, but it is not true that any application was made either by Mr. Harvey or the Governor as to any list but this. This has been throughout *the test case*, the result of which, of course, all the others would, and will in the main abide. (Trans., pp. 33, 44, 123; Letter of Commissioner that the appeal was from his decision as to this list, *id.*, on page 81.) In fact, there is nothing in the record about any other list. The railroad companies had a common interest in the *question*, and made common cause in carrying on the contest with this county, as this list was originally selected by the State commissioner as the *fittest representative* of the claims of the State, and selected undoubtedly for the reason, which sufficiently appears in his report, because it was more exactly in conformity with the commissioner's instructions than most, or perhaps any, of the others. As the others would be, and will now be, affected by any decision of the question made upon this list, they may be regarded as having been before the commissioner, but to that extent only.

As to what particular section of the statute of Iowa the court thought these proceedings, including the application for a new trial came under, I care very little; *we* don't claim that; we claim, as so often stated, that the statutes of Iowa, however they may regulate mere matters of practice, are not the source of our rights, and that our rights cannot be

prejudiced by them, or by anything that the supreme court of Iowa may say, or may have said, in respect to them.

To take a man's property from him involves something more than a *mere* question of practice. That a judgment regularly obtained is property, requires no argument in this Court, and if there is any statute in Iowa which allows a judgment so obtained to be *set aside and held for nought*, as counsel says the statute under which he claims these proceedings for a new trial were instituted does, not only without notice to the holder, and without giving him an opportunity to be heard against it, *but without showing any cause for setting it aside* UPON THE MERITS, titles are held in that State only at the pleasure of a tribunal which is capable of becoming the most dangerous of despotisms; for any tribunal which takes from a man his property, at its *discretion*, is just that kind of a despotism, and if it can be done the Constitution of the United States, and especially the fourteenth amendment, however imposing in circumstance and utterance, or interesting as *bric-a-brac*, will be of very little practical worth. As I understand it, we have not come to that yet.

But I have already taken too much of your Honors' time about this as a question of practice. The same questions, as maintained by me in my former brief, came up again when they concededly went to the merits.

This case is not only important in view of the large amount of property, the title to which, either immediately or by the principles which it will determine, depends upon its decision, but, as I look at the questions involved, it is of far greater importance in the principles which lie at the foundation of the difference between us—as to what tribunal is to finally determine, and by what *laws* they are to determine it—the question as to when and how the United States may be divested of its title to the public lands—*the primary disposal of the soil.*

GALUSHA PARSONS,
For Pfiff in Error.

12-16-5

Office Supreme Court U. S.
FILED.
OCT 27 1884
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 57.

THE COUNTY OF BUENA VISTA, STATE OF IOWA, PLAINTIFF IN ERROR.

vs.

THE IOWA FALLS & SIOUX CITY RAILROAD COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

ARGUMENT OF DEFENDANT IN ERROR.

E. S. BAILEY, Attorney for Defendant in Error.

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STATEMENT.

The petition charges that the plaintiff—the County of Buena Vista—"is the owner in fee simple of the land" in controversy; (3) that they were granted to the State of Iowa under the Swamp Land grant, by the act of Congress of September 28th, 1850; (4) that the same were granted to the County by the State under an act of the General Assembly of Iowa, passed January 13, 1853; (5) that each tract of land was of the description specified in the act of Congress; that in 1859 the plaintiff caused a list of said land to be made, in legal subdivisions, in all respects in accordance with the requirements of said act of Congress, and the rules and regulations of the U. S. General Land Office; that the list with the proper proof attached was filed in the office of Secretary of State of Iowa on or about January 1, 1860, and was afterwards recorded in the office of the Register of the State Land Office and thereafter filed in the office of the Surveyor General of the United States for the State of Iowa, and thereafter the same was duly filed, in January, 1866, in the office of the Commissioner of the General Land Office of the United States, where it has ever since remained on file; (6) that from time to time the plaintiff has applied to the Commissioner to examine and pass upon the sufficiency of the

list and allow it; that prior to July 7, 1875, it was unable to obtain a hearing or decision thereon, that notice of said application was given to the defendant by the Commissioner, the defendant resisted the application and the refusal to take up and examine said list was wholly by reason of defendant's resistance thereto, and its claim to said land; that on the day last named the Commissioner decided to take up said list for examination; that defendant offered no evidence in opposition to said proofs and lists, but appealed therefrom on the sole ground that the Commissioner had no jurisdiction to allow and certify the same; that the Secretary of the Interior upon said appeal directed the Commissioner to take no further proceeding in respect to the certification of said lands; that the original lists (a copy of which is annexed to said petition) after its removal from the office of the Surveyor General in 1866 remained at all times on file in the office of the Commissioner, open to inspection and was inspected by the defendant at the time of plaintiff's application and prior to the appeal; that in 1871 the Governor of Iowa, without being authorized so to do, issued to the defendant patents for all the land in controversy; that the patents were recorded in the Recorder's office of Buena Vista County, and that the same are a cloud upon the title of plaintiff; (8) that defendant has at all times been informed of plaintiff's title; that it has fraudulently claimed and still does claim the land and has sold portions of the same. (9.) The plaintiff asks judgment or decree confirming and establishing its title; that the patents be declared void and cancelled of record, or that defendant be declared to hold the land in trust for the benefit of the plaintiff and decreed to convey them to it, and that defendant be barred and estopped from claiming any right or interest in said land.

All the allegations of the petition and amendments thereto were denied by the defendant, except that it admitted the issue of the patents as therein stated but denied that they were without authority, and it admitted that it received the notice from the Commissioner and took an appeal from his decision, and that the notice of appeal is attached to the petition; that its attorneys made an argument on said appeal and that the Secretary made the decision, a copy of which is set out in this record.

In the second division of its answer it set out its title to the land, being in short the act of Congress, granting land to the State of Iowa to aid in the construction of certain railroads, approved May 15, 1856, the transfer of a portion of the grant by the General Assembly of Iowa to the predecessors of the defendant, the resumption of the same and a transfer thereof to the defendant, a compliance with the

several acts by the defendant and the issue of patents for for the lands, including the land in suit, by the Governor of Iowa to the defendant, and the allegation that thereby the defendant became and was seized in fee of said land.

The suit was tried in the District Court on written evidence and a decree was entered establishing the title of a part of the lands in the plaintiff and dismissing the bill as to the remainder. Both parties appealed to the Supreme Court and it was there tried *de novo* upon the evidence offered and introduced in the Court below. A decree was there entered dismissing the bill.

The suit was brought under the provisions of the Statute of Iowa, section 3273-6, chapter 2, title 20, Code, entitled "Of actions for the recovery of real property."

The following are the sections referred to:

QUIETING TITLE.

SECTION 3273. An action to determine and quiet the title of real property may be brought by anyone having, or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession.

SEC. 3274. The plaintiff must file his petition under oath, setting forth the nature and extent of his estate, and describing the premises accurately as may be, and averring that he is credibly informed and believes that the defendant makes some claim adverse to the claim of the petitioner, and praying for the establishing of the plaintiff's estate against such adverse claims, and that the defendant be barred and forever estopped from having or claiming any right or title to the premises adverse to the plaintiff. The notice in such action shall accurately describe the property, and in general terms the nature and extent of plaintiff's claim, and shall be served as in other cases.

SEC. 3275. If the defendant shall appear and disclaim all all right and title adverse to the plaintiff, he shall recover his costs. In all other cases the costs shall be in the discretion of the Court.

SEC. 3276. In all other respects, the action contemplated in the three preceding sections shall be conducted as other actions by equitable proceedings, with the modifications prescribed by this chapter so far as the same may be applicable.

When the case was before the Supreme Court on a former appeal—*49 Iowa, 657-652*—it was expressly held that "the proceeding instituted by the plaintiff is within the contemplation of the last four sections of the chapter under

consideration." (the sections above quoted.) This ruling was repeated in the case now before this Court.

The Supreme Court held that under the issue presented it is clearly incumbent on the plaintiff in order to the recovery of any forty acre tract in controversy to prove that the greater part of it was on the 28th day of September, 1850, wet and unfit for cultivation." (Opinion--Record 161.)

The finding and judgment of the Court upon the whole case was that "as the plaintiff failed to prove by competent and sufficient evidence that any of the lands in question are swamp and fall within the terms of the grant of September 28. 1850, the petition should have been dismissed." (Record, p. 163.) And it was accordingly dismissed. (p. 148.)

The only evidence which the Court found in the case upon this point was a paper purporting to be a copy of a list of swamp and overflowed lands situated in Buena Vista County. (Record, 30-75-161.) This paper was offered in evidence and admitted against the objection of the defendant as to its competency. (75-6.) The Supreme Court held that the objection was well taken and rejected it for incompetency.

The Statute of the State of Iowa, which provides for the appointment of agents to make examinations of swamp lands and lists and reports, and prescribes their duties as well as the object and purpose of the lists was passed January 13, 1853, and is section 927 of the Revision of 1860—as follows:

SECTION 927. In all those counties where the county surveyor has made no examinations and reports of the swamp lands within his county, in compliance with the instructions from the Governor, the County Court shall at the next regular term thereof, after the taking effect of this act, appoint some competent person, who shall as soon as may be thereafter, after having been duly sworn for that purpose, proceed to examine said lands, and make due report and plats, upon which the topography of the country shall be carefully noted, and the places where drains or levees ought to be made, marked on said plats, to the County Courts respectively, which courts shall transmit to the proper officers, lists of all said swamp lands in each of the counties in order to procure the proper recognition of the same on the part of the United States, which lists, after an acknowledgement of the same by the general government shall be recorded in a well-bound book provided for that purpose, and filed among the records of the County Court.

The Court found that the evidence of the appointment of the persons who purported to have made the lists, as agents for that purpose, viz: the mere *ex parte* affidavit of the person making the appointment (which affidavit was not sworn to) was improper, that the statute required that the agent should be appointed by the County Court, at a regular term thereof "the proper evidence of such appointment is the production of the record of the County *Court*. If no record was made or it had been lost the written appointment of the agent should be produced. If that is not available and parol evidence of the fact is proper, the evidence should be the testimony of witnesses subject to cross-examination and not the mere *ex parte* affidavit of the person making the appointment."

2. The Supreme Court also held and decided that the state statute under which selection of swamp lands was made did not provide that the lists should be evidence of any fact, that they were authorized to be made merely for the purpose of procuring the proper recognition of the same on the part of the United States and are in the nature of a claim or demand.

3. The Court further decided that under the statute, the lists are required to be transmitted by the County Court to the proper officers for approval.

"The regulations and instructions of the department show that this person is the Surveyor General. There is no proof that the list in question was ever transmitted to the Surveyor General, or that he ever had any opportunity of passing upon it. It is not shown that this list ever came into the possession of the Commissioner of the General Land Office or of the Secretary of the Interior, or that its correctness or validity was at any time recognized by any department of the government. It is true the Surveyor General, under instructions from the department of the government, submitted forms of proof; but his instructions required that the proofs made should be transmitted to his office for approval, and to aid him in making up the lists of the lands embraced in the grant, which is not shown by the evidence to have been done. So far as the evidence shows, the list constitutes no more than the claim of Buena Vista County, which has never been recognized, approved, or allowed by any department of the government. That it is exceedingly inaccurate and unreliable is evidenced by the fact that, while it embraces 551 tracts, the defendant established affirmatively and satisfactorily that 398 of them were high and dry, and fit for cultivation." (Record, 162.)

It will thus be seen the State Supreme Court decided that from the nature and character of the suit—it being brought under the provisions of the chapter of the Code of Iowa providing for actions to quiet title to real property—and the issues presented by the pleadings, it was incumbent upon the plaintiff to prove the swampy character of the land in controversy. This proposition will hardly be disputed. The Court then proceeding to an examination of the evidence found that it had failed to do so; that the paper purporting to be a list of the swamp lands of Buena Vista County was incompetent evidence; that there was no evidence that the persons who purported to have made the list as agents of the county were appointed by the County Court for that purpose, as contemplated by the statute; that the affidavit of J. W. Tucker, after he had gone out of office, that said persons were appointed by him, while County Judge, was incompetent.

The list or paper was thereupon rejected, and there was then no evidence before the Court that the lands in suit were, as claimed, swamp lands.

The question of the validity of this instrument is one of purely local law and in no sense a federal question, and as we understand the rule of this Court, it is not open to review here.

It is not the province of this Court on this writ of error to the State Supreme Court, to inquire whether the list was or was not made in conformity with the State law. That question was for the State Court to determine; and it has been determined in the negative.

The same, also, may be said of the decision of the Court that the statute of Iowa providing for the making of such lists does not provide that they shall be evidence of any fact.

Another fatal defect in the proof is that the list offered in evidence, incompetent and defective as it was, was not shown ever to have been transmitted to the Surveyor General or that it ever came into the possession of the Commissioner of the General Land Office or Secretary of the Interior.

The case then turned in the State Court entirely upon the question of the competency and sufficiency of the evidence to sustain a material allegation in the petition. The rejection of the list left the plaintiff without any proof whatever that the lands claimed had ever been in any manner or form selected by the County or that the County or State authorities had ever transmitted *this* list to the Surveyor General or that it ever came into the possession of the Commissioner or Secretary, or that its correctness or validity was ever recognized by any department of the government.

The foundation and basis of the plaintiff's claim to the lands is that they are swamp lands, and there was an entire failure of proof upon that point.

We do not understand then that there was any decision of a federal question made by the State Court, or that any such decision was necessarily involved in the case.

The decision that it must be shown, in this case, in some manner, that the lands were swamp, is one of general law. The affirmative allegation to that effect in the petition is denied in the answer. It is a substantive and essential averment—a failure to substantiate which by competent and sufficient evidence would necessarily defeat a recovery.

Unless the lands were in fact swamp lands, such as are contemplated by the act of September 28, 1850, then the plaintiff has no right, title or interest in them If they were not such lands, and therefore excepted out of the railroad grant, then clearly the title of the railroad company was complete. The lands were all certified to the State as enuring to the railroad grant December 27, 1858, and patents therefor issued to the defendant by the State in July and August, 1871.

The decision of the Court rejecting the list was based upon the common law rules of evidence and the construction of the State statute The authority of the supposed agents and their appointment by the Court could not be established by the unverified affidavit of a former Judge of that Court who was out of office.

This cannot be said to be a federal question, nor the other point made by the Court as to the entire absence of proof that the pretended list offered in evidence was ever transmitted to the Surveyor General or Commissioner of the General Land Office.

In the decision of the Court there was involved no construction of the act of Congress, or any of the rules and regulations of the Land Department. At all events none that was adverse to the right or title set up by the plaintiff. It is true that the plaintiff claimed title under the Federal Government, as also did the defendant, but that fact does not necessarily raise a question of federal cognizance.

Carpenter v. Williams, 9 Wall., 785
Mills County v. Railroad Company, 107 U. S., 557-564.

II.

But if this Court goes beyond the opinion of the Supreme Court of Iowa, and reexamines the judgment of that Court, it must come to the same conclusion.

Without repeating what has been said the case presented by the pleadings is that of the defendant holding the legal title to lands, the beneficial and equitable ownership of which is claimed to be in the plaintiff, and this suit under the State statute is brought to annul the defendant's legal title and establish the plaintiff's equitable title.

The plaintiff claims that they were granted to the State under the Swamp Land Grant—that is they were of the character and description of lands mentioned in that Act, viz.: The greater part of each legal sub-division is wet and unfit for cultivation.

Now, while under the Swamp Land Act it was primarily the duty of the Secretary of the Interior to decide this question, yet, as the plaintiff claims, he has neglected and refused so to do. Because of such failure the plaintiff is authorized to institute this proceeding. It is clearly incumbent upon the plaintiff to establish to the satisfaction of the Court that the lands were of the description specified in the grant. There is no presumption of law or fact in its favor. The defendant has the legal title by certification and patents from the National and State governments, and the plaintiff's testimony to displace that legal title must be clear and convincing, and not inferential or conjectural. The only evidence offered for that purpose is the pretended lists—which we have already referred to. We urge the views of the Supreme Court in respect to them as to their incompetency and insufficiency.

III.

But it is argued that under some alleged agreement made between the Secretary of the Interior and the State of

Iowa, selections of swamp lands by the State are or were to be accepted as evidence, *prima facie*, or conclusive, of the actual quality of the lands embraced in them.

In the first place no such agreement was ever made, and secondly, if made, it would not be binding on the Court or on the defendant.

No such agreement was made. It is true that in the correspondence contained in the record passing between the Governor and State agent or Commissioner allusion is made to an arrangement or agreement by which the State should make selections of land claimed by it to be swamp. The letter or report of J. A. Harvey to the Governor of Iowa, of March 14, 1872(p. 32) says: "It was *agreed* between the State and the Department soon after the passage of the Act that the State should select, by agents appointed for that purpose, the land claimed as swamp and overflowed, and report them to the Surveyor General. That officer was directed to examine all such lists of selection and all evidence furnished by the State touching the character of the land, *in connection with the field notes of the Government survey, plats, etc., in his office, and report to the General Land Office as swamp selections, such as in his judgment, from examination, came within the meaning of the grant.* Such as he thus reported was then recorded in the swamp division of the General Land Office, and held as legitimate selections."

This is the State Commissioner's understanding of the alleged agreements, and the scope and effect of the State selection. It will be observed that he attributes the same effect to these lists or selections as the Supreme Court did, namely, that they were in the nature of a claim or demand.

Another reference to an "agreement" is made in the letter of the Commissioner to the Secretary, dated April 29, 1869, (Record 35-4) as follows:

"In order to a full understanding of the case I will state that in the State of Iowa the swamp selections under the grant of 1850 were by agreement made by agents appointed by the State, who, from examination in the field, made the selection of lands shown to be swamp. These selections were required to be filed with the Surveyor General of that district to be by him revised. All tracts which, in the judgment of that officer, came within the meaning and intent of the grant were then placed in list form by the Surveyor General, and after appending his official certificate touching their swampy character, the lists were forwarded to this office. The practice has been to recognize only such tracts as were thus reported through the Surveyor General."

The various letters, reports, etc., seem to indicate that soon after the passage of the Swamp Land Act the option was extended to the State either to have the swamp land lists made up by the Surveyor General from the notes of his surveys, or the State should make up lists, by its own agents, and submit them to the Surveyor General. (Commissioner's instructions, 58-9) It is understood that the State of Iowa adopted the latter mode and the Act of January 13, 1853, the portion of the same relating to this subject being Section 927, Revision, printed on page 4 of this argument, is the evidence of its adopting that mode. It also provides for the appointment of agents and prescribes their powers and duties. This is the only *agreement*, we submit, that was made between the Land Department and the State.

The power and authority of the State selecting agents are derived from the statute above quoted. No other agents or persons had the right to make selections or lists on the part of the State than those appointed under and in pursuance of that statute. It is clearly within the jurisdiction of the State Courts to determine in any given case whether the statute has been complied with, whether a pretended agent is rightfully an agent or not, whether he has been appointed by competent authority,—such as the statute prescribes—whether his acts are in conformity with it, and the scope, purpose and effect of such acts.

Counsel claims that the lists in controversy are independent of the statute, "that he had never thought of making any claim under it." (Arg. 32) But the forms submitted for making the lists recognize the statute as the authority under which they are to be made. On page 73 a form is given, reciting that the list is selected and returned by the County Surveyor or State Agent "*under authority of and according to an act of the General Assembly of the State of Iowa, approved January 13, 1853.*"

It seems very plain that the lists, in order to be of any validity or competency, should be made in conformity with the State law, and whether they are or not is a question of State and not federal law.

If there were any instructions from the Secretary or Commissioner to the Surveyor General or other subordinates that the lists should be accepted by them as evidence, of any grade, of the quality of the lands, they were simply in the nature of office rules or regulations, and not obligatory upon the Courts.

Even if the Department might prescribe the kind and character of the proofs it would accept, and receive and act upon the lists offered here, imperfect as they are, or might require or act upon other proofs, or upon none at all, yet when the matter is brought into the Courts then only such evidence as is prescribed by statute or the rules of common law is admissable.

IV.

But if it shall be held that these copies of lists or selections are competent *prima facie* evidence of the quality of the lands, then we submit that the testimony of the defendant is abundantly sufficient to overcome such presumption as to all the tracts testified to by defendants' witnesses. We do not propose to review in detail this testimony. (Record, 90-120.) The witnesses, Lawrence Regan, O. D. Petit, Robert Cummins and Robert Deloss, were personally before the District Court and testified at length and in detail as to each tract of land examined by them, and they showed how they acquired their knowledge, the care and skill they exercised in making the surveys, their experience in such matters, and their knowledge of the previous history and character of the country surveyed. Their plats and diagrams of each tract were also introduced in evidence in the Court below, showing the lines, courses and distances of the different qualities of land. An opportunity was furnished to the plaintiff to cross-examine them, and it is safe to say that their testimony that none of said tracts came within the specifications of the Swamp Land Grant was not in the least

shaken. No one can read this testimony without being convinced of the utter unreliability and falsity of these alleged official lists. No other evidence of their worthlessness and fraudulent character need be offered than the uncontradicted statements of these witnesses who personally examined the land, who testify that a large number of the tracts designated on the "lists" as "swampy prairie" are the finest, dryest, and highest farms in Buena Vista County, in a high state of cultivation, and covered with growing crops. Besides, portions of the villages of Storm Lake and Alta, including mills, public building, railroad and depot, are built on land embraced in the lists. In our judgment they are successfully impeached as false and fraudulent, and no credibility ought to be extended to them.

V.

It is argued by plaintiff's counsel that the defendant is estopped and concluded from offering, in this suit, any testimony touching the quality of the lands or from contesting the sufficiency of the supposed "proofs" contained in the selections or lists. In other words, the defendant will not now be permitted to offer proof of the actual character of the lands in controversy and show that they are not swampy, because it failed or omitted to do so before the Commissioner—and this estoppel is claimed upon the ground that the

Commissioner having notified the defendant that he was about to take up and investigate the claims or selections of the lands made by plaintiff, and to appear and contest such claim if it desired, the defendant in pursuance of such notice did appear before the Commissioner and objected to the investigation of plaintiff's claim to the lands for the reason that the same lands had been certified by the Department to the State under the railroad grant, and had been patented by the State to the defendant, and that thereby, and by reason thereof, all control of the Executive Department over the lands had passed away, and over the title conveyed by such certification. The Commissioner overruled the objection made by the defendant. From this decision the defendant appealed in due time to the Secretary of the Interior, and they urge the following objections: (Record 48.)

1st. That the State is estopped by her own acts and the acts of her authorized agents from asserting any claim to the lands in question.

2nd. That said lands, having been once duly certified to the State or to the railroad companies under the railroad grants, have passed beyond the jurisdiction of this Department.

Upon this appeal the decision of the Commissioner was overruled and reversed, and it was ordered that no examination or certification of the lands should be made. The State did not appeal therefrom to the President, as it might. Now it is argued by plaintiff that in consequence of these proceedings the defendant is estopped in this Court, and in this suit, from showing that the lands are in fact not swamp lands

Counsvl also claimed in his argument before the Supreme Court, that "the sole question which that Court has jurisdiction to try, is whether the Secretary decided that question correctly. If he did the plaintiff must fail; if he did not, it is entitled to such judgment as he should have given *upon the evidence before him.*"

1. This decision of the Secretary was correct, and in accordance with the previous decisions of the Department and the adjudications of the Courts.

The lands, in the year 1858, and before any claim was made to them on the part of the County or the State for the County, were certified to the State as railroad lands under the act of May 15, 1856 (Record, 87.)

These certificates issued by the Secretary were issued under the provisions of the act of Congress of August 3rd, 1854, (Revised Statutes, 2449) and they had the effect of conveying the fee simple title of all the lands embraced therein, which were intended to be granted by the act. They

involve the determination by the Department of what lands are embraced, and intended to be granted thereby. The Secretary decided that the lands were intended to be granted by the Act. It was his duty and he had the power to decide that question, and when his decision was made it stood like the judgment of any other tribunal in full force and effect, until reversed or corrected in an appropriate proceeding for that purpose.

The certificate or "certified list" is precisely like a patent in its office and purpose. It stands in the place of a patent, and like a patent conveys the fee simple. It is a "muniment of title." The statute which provides for the certificate in declaring that it shall be null and void as to all lands embraced therein, not intended by Congress to be granted, does not change its character from that of a patent.

It states nothing which the law does not import. Every patent as well as these certificates is issued subject to the conditions of the law under which it purports to be issued.

"Patents and other important instruments issuing from the Crown or other executive branch of the Government, have been corrected or declared void, or other relief granted."

French v. Fyan, 93 U. S., 169.

In *Williams v. Baker, 17 Wall 144-6*, the Court in speaking of this class of certificates says:

"The Secretary of the Treasury, as the lands were selected by the agent of the State and the selections approved by him, certified the approved lists to the State, and this was and always has been considered the appropriate mode of *evidencing the title of the State* under the grant."

In *Leavenworth &c. v. United States, 92 U. S. 733-9*, the bill was brought by the United States to establish its title to certain tracts of land. These tracts were specifically described in certified lists furnished by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, to the Governor of Kansas, and were subsequently conveyed by the latter to the defendant. The Court says:

"Having the force and effect of a patent (10 *Stat.* 346) *the lists passed the title of the United States to the tracts in question*, if they were embraced by the grant in aid of the construction of the appellants' road."

It will be seen that the certificate stands on the same footing as the patent, and hence upon the execution of the certificate the title passes from the Government.

When the title has passed from the Government in whatever way, all control of the Executive Department over the title absolutely ceases. When the Department has executed one grant, its officers cease all action under another grant of the same lands. This is and has been the uniform rule of the Land Department.

It is also the rule laid down by this Court. In *Moore vs. Robbins, 96 U. S. R., 530-2*, the Court said:

"While conceding for the present to the fullest extent that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Department to decide that question, it is equally clear that when the patent has been awarded to one of the contestants, and has been issued, delivered and accepted, all right to control the title or to decide on the right to the title has passed from the Land Office. Not only has it passed from the Land Office but it has passed from the Executive Department of the Government. A moment's consideration will show that this must, in the nature of things, be so. * * * * * * * * * *

With the title passes away all authority or control of the Executive Department over the land and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel or annul the instrument which he has made and delivered. If fraud, mistake, error or wrong has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the Government is the party injured this is the proper course. * * * * * * * * * *

But in all this there is no place for the further control of the Executive Department over the title. The functions of that Department necessarily cease when the title has passed from the Government.

In *United States vs. Stone, 2 Wallace, 535*, the Court says:

"The patent is but evidence of a grant and the officer who issues it acts ministerially and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority. But one officer of the Land Office is not competent to cancel or annul the acts of his predecessor. That is a judicial act and requires the judgment of a Court."

Johnson v. Towsley, 13 Wall. 73, 83-4
Marquez v. Frisbie, 101 U. S., 473.
U. S. v. Schurz, 102 U. S., 378.
Decision of Secretary of Interior printed in full in Record 49.

It will therefore be seen that by the usage and practice of the Land Department and the decisions of the Courts, the title to all the lands embraced in the lists had passed from the Government and with the title all authority and control of the Executive Department over the land had passed away. Even if, as a matter of fact, the lands were swamp (and we have shown they were not) still the functions of the Department over them had ceased and there was no place for the exercise of its authority in respect to the title.

The decision of the Secretary in refusing to take up and examine and allow or disallow these lists which contained lands, the title to which had passed from the Government, was correct, and in accordance with law.

2. The plaintiff then having resorted to the Land Department wrongfully and improperly, and having been met

and defeated there on the grounds above stated, now claims that we are confined in our defense here to the sole grounds successfully pleaded there, and that we are precluded from introducing testimony to contradict an allegation set out in the petition and denied in the answer.

We do not understand that this cause is in any sense a continuation of the hearing before the Department at Washington, or an appeal from its decision. That was an independent proceeding If any estoppel arose by reason of any pleading or adjudication in that cause it was equally effective as against all parties thereto. If the Secretary of the Interior and his subordinates constituted a special tribunal for the trial of this cause, whose decision was final, then plaintiff as well as defendant is estopped from attacking such decision collaterally. If plaintiff has any standing in this cause it must be in consequence of the failure of the proper tribunal to act, and no estoppel can arise as against either party, except with respect to issues actually before the Commissioner.

The Department never rendered any decision upon the proofs of plaintiff, for the reason that the cause never advanced so far as the consideration of proofs of any kind, and there was never any opportunity for defendant to impeach the proofs of plaintiff, before the Department, for the reason that it decided that it had no right to consider proof.

It is re-iterated over and over again by counsel that the Commissioner of the Land Office passed upon the sufficiency of the "proofs "and held them sufficient. But an examination of his decision will show that no such ruling was made. It will be borne in mind that his decision does not apply specially to the particular list in controversy—to the Buena Vista County lands, solely or particularly—but to lists from a large number of counties and of lands claimed by the Cedar Rapids & Missouri River Railroad Company and Dubuque and & Sioux City Railroad Company, as well as the defendant, as is shown by his letter, the Secretary's decision, and the notice of appeal. (45 50) On page 47 the Commissioner says:

"The State has long since claimed the lands as swamp lands, and furnished *prima facie* evidence that they were of that character. *This claim has not yet been examined by this office*, and until it is so examined and either rejected or approved the duty of this department is not performed." Further on he says: "I conclude, therefore, after careful examination of the whole subject, that unless the State authorities shall formally abandon the claim of the State, this office has no right to refuse to make the investigation in regard to the swampy character of these lands, and if any of them are found on examination to be of the description of lands granted to the State as swamp and overflowed lands, it will be the duty of the Department to cause the same to be certified, and on request of the Governor, patented to the State as such."

The whole letter taken together makes it plain that the Commissioner decided that he had no right to refuse to take up and examine the proofs in his office—those furnished by the Counties, the field notes made by the Surveyor General and such other proofs as were accessible to him—and if they satisfied him of the swampy character of the land to certify them.

The defendant raised an objection to the hearing of the case and the objection was sustained, the department holding, among other things, that such lands as had been duly certified to the State or to said companies under the grants made to aid in the construction of certain railroads, had passed beyond the jurisdiction of the Department. The defendant is not seeking to avoid or set aside this decision. The plaintiff's counsel seem to treat the defendant as the defeated party before the Department, and as if the defendant in this action was the moving party endeavoring to get rid of the adjudication of the department. He seems to lose sight of the fact that the former adjudication, viz: the Secretary's decision not to take up and allow the alleged lists or selections of the plaintiff, was an adjudication in favor of the defendant and against the plaintiff.

If any one is estopped by the decision it is the plaintiff. If any one is concluded by it, the plaintiff is. If we had been defeated there, and had brought this suit here, seeking to set aside an adjudication against us upon grounds of which we did not avail ourselves upon such hearing, but which we might have done, then plaintiff's argument and authorities might possibly have some force against us. But when we were the successful party upon that hearing and are willing to abide by the result thereof, and the plaintiff brings us into the Courts with the view of overturning that decision, or getting rid of its effects, it is an anomaly in jurisprudence to assert that we are estopped from setting up any defense which we may happen to have, but are confined to the point which we successfully raised in the former tribunal.

VI.

It is insisted by plaintiff that the act of Congress approved March 5th, 1872, (44) created a special tribunal for the determination of the issues involved in this case, and from the decision of that tribunal—*i. e.*, the Commissioner of the General Land Office—there is no appeal, and that its jurisdiction is exclusive.

The Commissioner of the General Land Office is a subordinate officer in the Department of the Interior, and by statute he is required to perform, under the direction of the

Thereupon the plaintiff filed an answer to the petition to vacate the judgment, (26-51) which on motion was stricken out)52) and the usual order made granting a new trial on terms, which were complied with.

The ruling of the District Court in striking out this answer is complained of by plaintiff's counsel and he alleges that it involves a federal question, (argument 19) which this Court will review.

All that need be said on this subject is well stated in the opinion of the Supreme Court. (159.)

"1. It is claimed by the plaintiff that the application was improperly granted. Most of the positions assumed by the plaintiff were determined adversely to it on the former appeal. 49 *Iowa* 657. The only position of the plaintiff which requires notice is that the plaintiff should have been allowed to answer the petition or application for a new trial and have a trial of the issue thus raised.

First. Upon the former appeal it was held that the proceeding instituted by plaintiff is within the contemplation of the last four sections of chapter 2, title 20 of the Code, and that defendants' application for a new trial falls within section 3268 of the Code. This section authorizes the Court in its discretion, upon the application of a party made at any time within a year from the former trial, to grant a new trial, although the grounds required for a new trial in other cases be not shown. The section does not seem to contemplate any notice to or defense by the other party, for section 3269 provides that if the application for a new trial is made after the close of the term at which judgment was rendered, the party obtaining a new trial shall give the opposite party 10 days' notice thereof before the term at which the action stands for trial—a proceeding altogether unnecessary and unmeaning, if the party is allowed to take issue upon and defend against the application."

It will be seen that the decision of the Court striking out this answer and refusing to permit the plaintiff to controvert the facts upon which the application to vacate the judgment and grant a new trial, is based on a mere question of practice and in no manner prevented the plaintiff from pleading and proving its cause of action.

Under section 3268-9, Code, printed in ~~full on page 5 of~~ plaintiff's ~~argument~~ appendix, on applications to grant new trials, in actions for the recovery of real property, the other party is not entitled to controvert the facts set out in the motion, nor is he even entitled to notice of the application.

The proceeding in this case is also entirely independent and separate from that provided for in sections 3154 to 3162, Code, printed on page 4 of plaintiff's argument, as will be seen by an examination and comparison of sections 3157-8-9 with 3268-9, and also by reference to the opinion of the Supreme Court in 49 Iowa 657, holding that the judgment should be vacated and a new trial granted.

It is further claimed in plaintiff's argument (18) that although a new trial was ordered the judgment was not vacated.

The application was for the vacation of the judgment and granting a new trial. The Supreme Court held that the application ought to have been granted and reversed the order refusing it. The order finally entered by the District Court in pursuance of the direction of the Supreme Court (52) does not in terms vacate the judgment, but that would necessarily follow from granting a new trial. This is believed to be the universal practice, except in special proceedings such as are contemplated in section 3157 *et seq.*, above referred to, and the like. In *Low v. Fox, 56 Iowa, 221-4*, the Court said: "The granting of a new trial *ex vi termini* was a vacation of the judgment entry."

When the order was entered the case stood for trial precisely as it did before the former trial was had.

"The cause was then set down for hearing upon written evidence." (58)

It was so tried according to the course prescribed for the trial of equitable actions.

Sec. 2742. "But in equitable actions wherein issue of fact is joined, all the evidence offered in the trial shall be taken down in writing, or the Court may order the evidence, or any part thereof, to be taken in the form of depositions, or either party at pleasure may take his testimony or any part thereof by deposition. All the evidence so taken shall be certified by the Judge in term or vacation, be made a part of the record and go on appeal to the Supreme Court, *which shall try the case anew.*"

The plaintiff was required to make his whole case and it did so, although it is now claimed that it was unnecessary. (Brief 16, Arg. 30-31)

On appeal to the Supreme Court the case was there tried *de novo*.

In addition to the authorities cited on page 7 of this brief in respect to the questions which this Court will review on writs of error to State Courts, the following are cited:

Moore v. Mississippi, 21 Wall. 636.
Klinger v. Missouri, 13 Wall. 257-263.
Bolling v. Lersner, 91 U. S., 594.
McManus v. O'Sullivan, id. 578.
Brown v. Atwell, 92 U. S., 327.
Lange v. Benedict, 99 U. S., 68.
Citizens' Bank v. Board, etc., 98 U. S., 140.
People v. Weaver, 100 U. S., 539.
Williams v. Weaver, 100 U. S., 547.
Boughton v. Exchange Bank, 104 U. S., 427.
Mills Co. v. R. R. Co., 107 U. S., 557-564.
Crossley v. New Orleans, 108 U. S., 105.
Choteau v. Gibson, 111 U. S., 200.

The case of *Grinnell v. Railroad Co., 103 U. S., 739* was inadvertently omitted in the 5th point of this argument and was intended to be cited as an authority in support of the proposition that the certificates or "certified lists" of lands, issued by the Secretary of the Interior to the State of Iowa, under the railroad grant of May 15, 1856, passed the title from the United States. In reference to land certified under the same grant the Court, speaking by Mr. Justice Miller, said:

"The location was made and the map filed in the land office, the selection of lieu lands was made and approved, and the entire list regularly certified to the State of Iowa, as early as December, 1858, and with this certificate the last act of the United States, which could in any event be held necessary to passing the title was performed, and either the State of Iowa or the railroad company—it is immaterial which for the purposes of this suit—had become invested with the full legal title to the lands so certified."

Respectfully submitted,

E. S. Bailey,

Attorney for Defendant in Error.

APPENDIX.

Sections 3268–9 of the Code of Iowa are referred to in defendant's argument, on page 20, as being printed in full in plaintiff's argument. Plaintiff having reprinted its argument and omitted those sections, they are here produced. They are contained in the Chapter relating to "actions for the recovery of real property."

SECTION 3268. In any of the cases provided for by this chapter, the court, in its discretion, may grant a new trial on the application of any party thereto, or those claiming under a party, made at any time within one year after the former trial, although the grounds required for a new trial in other cases are not shown; but only one such new trial shall be granted.

SECTION 3269. If the application for a new trial is made after the close of the term at which the judgment was rendered, the party obtaining a new trial shall give the opposite party ten days' notice thereof before the term at which the action stands for trial.

E. S. BAILEY,
Att'y for Def't in Error.

112-177

SUPREME COURT OF THE UNITED STATES.

Isaac R. Barksdale, Treasurer, Morton Marye, Auditor of Public Accounts, and Frank G. Ruffin, Second Auditor, and as such *ex officio* the Board of Commissioners of the Sinking Fund of the State of Virginia, Petitioners,

against

The Circuit Court of the United States for the Eastern District of Virginia, and the Honorables, Hugh L. Bond and Robert W. Hughes, judges of the said Circuit Court of the United States for the Eastern District of Virginia, at Richmond, Defendants.

A PETITION FOR A MANDAMUS.

SUPREME COURT OF THE UNITED STATES.

To the Honorables, the Justices of the Supreme Court of the United States:

Isaac R. Barksdale, Treasurer, Morton Marye, Auditor of Public Accounts, and Frank G. Ruffin, Second Auditor, and as such *ex officio* the Board of Commissioners of the Sinking Fund of the State of Virginia, Petitioners,

against

The Circuit Court of the United States for the Eastern District of Virginia, and the Honorables, Hugh L. Bond and Robert W. Hughes, judges of the said Circuit Court of the United States for the Eastern District of Virginia, at Richmond, Defendants.

A PETITION FOR A MANDAMUS.

Your petitioners above named, appearing in this behalf by F. S. Blair, Attorney-General of Virginia, respectfully state unto your honors the following case:

1. The said Isaac R. Barksdale is the Treasurer of the State of Virginia, said Morton Marye is the Auditor of Public Accounts of the State of Virginia; and said Frank G. Ruffin is the Second Auditor of the State of Virginia; and all three of them have severally been duly elected and qualified to their respective offices in accordance with the Constitution and laws of the State.

2. The Constitution of Virginia, which was adopted by the people on the 6th of July, 1869, and which became operative by virtue of an act of Congress approved January 26th, 1870, in Article X, section 8, prescribes that the General Assembly shall provide by law a sinking fund.

3. The General Assembly of Virginia, by an act approved March 30th, 1871, entitled "An act to provide for the funding and payment of the public debt," and in section five thereof, provided a Sinking Fund; and appointed the Treasurer, the Auditor of Public Accounts, and the Second Auditor "Commissioners of the Sinking Fund."

4. By another act approved February 14, 1882, entitled "An act to ascertain and declare Virginia's equitable share of the debt created before and actually existing at the time of the partition of her territory and resources, and to provide for the issuance of bonds covering the same and the regular and prompt payment of interest thereon," [commonly called the Riddleberger act,] the General Assembly of Virginia empowered and directed your petitioners, under the name and style of the "Board of Commissioners of the Sinking Fund of the State," to *create* and *issue* bonds, registered and coupon, in the name of and on behalf of the Commonwealth of Virginia, to an amount exceeding twenty millions of dollars.

5. In addition to the great responsibility aforesaid, the General Assembly, by said last-mentioned act, imposed upon your petitioners other delicate, difficult, and most important executive functions and duties.

6. Under the Constitution and laws of Virginia, your petitioners, as Commissioners of the Sinking Fund, or as the Board of Commissioners of the Sinking Fund of the State, are part and parcel of the executive department of the government of the Commonwealth of Virginia, charged with high executive functions and duties, and are responsible alone to the properly constituted authorities of said Com-

monwealth, whose officers, agents, and servants your petitioners are; and they are not a corporation.

7. All the acts and deeds of your petitioners as Commissioners as aforesaid, done and performed within the scope of the powers and duties imposed upon them by the Constitution and laws of Virginia, are the acts and deeds of said Commonwealth of Virginia.

8. All other acts and deeds of your petitioners as Commissioners as aforesaid, whether done and performed voluntarily or under compulsion, are not the acts and deeds of the Commonwealth of Virginia; but they are *ultra vires*, unlawful, null and void.

9. The limits and measures of power and authority conferred upon your petitioners, being defined by legislative acts of the General Assembly of Virginia, are conclusively presumed to be known to all persons having dealings with your petitioners; and they, as well as your petitioners, must take notice thereof at their peril.

10. All judicial proceedings against your petitioners as Commissioners as aforesaid, all judgments rendered against them, all decrees pronounced against them, and all judicial mandates addressed to them as Commissioners of the Sinking Fund of the State, are in substance and effect, in very fact and very truth, proceedings, judgments and decrees against, and mandates to, the Commonwealth of Virginia, one of the co-equal States of the United States of America.

11. Your petitioners are advised, and they most respectfully allege and affirm, under protection of the Eleventh Amendment to the Constitution of the United States, that the Judicial Power of the United States, from this its most exalted member to its most subaltern branch inclusive, does not extend to an action at law, or suit in equity, or other judicial proceeding instituted or brought against the Commonwealth of Virginia, or against your petitioners as Commissioners as aforesaid.

12. Nevertheless, on the 14th day of August, 1884, one Hewitt Coburn, Jr., a citizen of the State of New York, presented to the Hon. Robert W. Hughes, one of the judges of the Circuit Court of the United States for the Eastern District of Virginia, a petition for a *mandamus* to your petitioners, as Commissioners as aforesaid, requiring your petitioners to give to him, the said Coburn, $22,716 of bonds of the Commonwealth of Virginia, to be issued under the act of Assembly approved February 14, 1882, as aforesaid [the Riddleberger act], in exchange for $22,716 of coupons described in said Coburn's petition, dollar for dollar.

13. In said petition said Coburn alleged that he was the holder for value of $22,716 of tax-receivable coupons cut from bonds of the Commonwealth of Virginia, issued under the act of Assembly approved March 30, 1871, and hereinbefore referred to, and that all of said coupons were past due—some of them having matured January 1st, 1883, some on 1st July, 1883, some on 1st January, 1884, and the others on 1st July, 1884. And said Coburn claimed that he was entitled to demand and receive from your petitioners, as Commissioners as aforesaid, $22,716 of bonds of the Commonwealth, to be issued under the Riddleberger act aforesaid, in exchange for his coupons aforesaid, dollar for dollar; and he alleged that your petitioners had refused to create and issue said bonds to him, and to make such exchange, although duly requested so to do.

14. On the said 14th day of August, 1884, the said Hon. Robert W. Hughes awarded the said Coburn a rule against your petitioners, returnable at the court-room in the city of Richmond on the 2d day of September, 1884, requiring your petitioners to show cause, then and there, why a *mandamus* should not be awarded against your petitioners in accordance with the prayer of said Coburn's petition aforesaid.

15. On said 2d day of September, 1884, at a Circuit Court of the United States for the Eastern District of Virginia, held in the city of

Richmond by the Hon. Robert W. Hughes, judge, judgment was entered against your petitioners as follows:

"This cause came on this day to be heard upon the petition of the plaintiff filed August 14, 1884, the rule thereon returnable this day and duly executed on the defendant corporation, but to which rule no answer has been made, and upon the plaintiff's evidence, and was argued by counsel of both parties:

"On consideration whereof, the Court doth order and adjudge that a peremptory *mandamus* be and the same is hereby awarded to the plaintiff, commanding the defendant corporation, immediately after receipt hereof, and upon the surrender and delivery to it of the coupons mentioned in the said petition, to give to plaintiff or his attorneys of record, Legh R. Page and James H. Dooley, in exchange therefor, dollar for dollar, coupon bonds issuable under the act of the General Assembly of Virginia, approved February 14, 1882, commonly known as the Riddleberger Debt law.

"A certified copy of this order and of the paper marked Exhibit A, filed with the said petition, showing the number of the bonds from which said coupons were cut, and the date of their maturity, will be forthwith served on the defendant corporation.

"And the Court certifies that it was shown by the evidence that the matter in dispute in this cause exceeds, exclusive of costs, the value of $500, and is less than the value of $5,000.

"And it is further ordered that the plaintiff recover of the defendant corporation his costs; but no execution shall issue therefor until the further order of the Court.

"(Signed) Ro. W. Hughes.

"Richmond, 2d Sept., 1884."

16. Afterwards, on the 7th day of October, 1884, at a Circuit Court of the United States for the Eastern District of Virginia, held in the city of Richmond by the honorables Hugh L. Bond and Robert W. Hughes, judges, your petitioners presented and filed, in open court, a petition praying a writ of error to the judgment aforesaid, in order that the same might be reviewed by the Supreme Court of the United States.

And both of said judges, the Hon. Hugh L. Bond and Hon. Robert W. Hughes, by an order entered of record in said court, then and there refused to allow your petitioners a writ of error to said judgment.

17. Your petitioners exhibit and file herewith copies of the papers hereinbefore referred to, and pray your honors to read them as part of this petition, as follows, to wit:

EXHIBIT 1. [*The 8th Section of Article 10 of the Constitution of Virginia.*]

SEC. 8. The general assembly shall provide by law a sinking fund, to be applied solely to the payment and extinguishment of the principal of the state debt, which sinking fund shall be continued until the extinguishment of such state debt; and every law hereafter enacted by the general assembly, creating a debt or authorizing a loan, shall provide a sinking fund for the payment of the same.

EXHIBIT 2. [*Act of Assembly, approved March 30th, 1871, p. 380.*]

5. Whatever sum may be realized from the claims of this state against Selden, Withers and Company, and the Chesapeake and Ohio canal company, and from the sale or disposition of the stocks and bonds, and debts owned by the state in and against any and all railway and other improvement companies, and all sums which may be realized from the claims of this state against the United States, and from any sales of any real estate now belonging to the commonwealth, shall be paid into the treasury of the state to the credit of the sinking fund hereby authorized and created. In the year eighteen hundred and eighty, and annually thereafter, until all the bonds issued under and by authority of this act shall have been paid, there shall be levied and collected, the same as other taxes, a tax of two cents on the one hundred dollars of the assessed valuation of all the property, personal, real, and mixed, in the state, which shall be paid into the treasury of the state to the credit of the sinking fund. The treasurer, the auditor of public accounts, and second auditor are hereby appointed commissioners of the sinking fund, and shall have (a majority acting) the control and management thereof, and shall annually, or oftener, apply whatever sum or sums

may be to the credit of the sinking fund, to the purchase and redemption of bonds issued by authority of this act.

EXHIBIT 3. [*The Act of Assembly, approved February 14th, 1882.*]

5. The said Board of Commissioners are authorized to issue such bonds, in denominations of Five hundred and One thousand dollars as may be necessary to carry out the provisions of this act, each denomination to be of different tint: provided that Registered bonds may be issued of any denomination, multip'e of one hundred, all registered bonds to be of the same tint; and they are authorized *and directed* to issue such bonds, registered or coupon, in exchange for the outstanding *evidences of debt* hereinbefore enumerated, including the bonds held by the Literary Fund, as follows, that is to say: (A) For her equitable share of class A, at the rate of Fifty three per centum; that is to say, Fifty three dollars for the bonds authorized under this act, (principal and accrued interest, at par, from the preceding period of maturity to the date of exchange) are to be given for every one hundred dollars, face principal, and accrued interest from the preceding semi-annual period of maturity to the date of exchange of such *evidences of debt;* and for any interest which may be past due and unpaid upon *the same* funded, bonds issued under this act may be given, dollar for dollar. (B) For her equitable share of class B, at the rate of sixty per centum, reckoning and accounting for any interest, as provided in the case of class A– (C) For her equitable share of class C, at the rate of sixty nine per centum, reckoning any current interest *at the date of exchange, as* in the cases of classes A and B, and *accounting for* the same as provided in class D.— (D) For her equitable share of class D, at the rate of eighty per centum— (E.) For her equitable share of class E, at the rate of sixty nine per centum, reckoning any current interest, at the date of exchange, as in the cases of classes A, B and C, *and accounting* for the same as provided in class F.– (F) For her equitable share of class F at the rate of sixty three per centum— (G.) For her equitable share of the bonds of the Literary Fund, as in the case of Class C; her equitable share of the arrearages of interest three hundred and seventy nine thousand, two hundred and seventy dollars to be paid in money.—

EXHIBIT 4. A transcript of the record of the proceedings in the case of Hewitt Coburn, Jr., against the Board of Commissioners of the Sinking Fund of the State of Virginia, and a copy of the order refusing a writ of error.

18. Your petitioners respectfully represent that they are aggrieved by the refusal of said Circuit Court, and of said judges, to allow them a writ of error to the judgment aforesaid, in order that said judgment, and the question of jurisdiction, and the question of the right interpretation of the Act of Assembly, approved February 14, 1882, (the Riddleberger act,) involved in said judgment, may be reviewed by the Supreme Court of the United States.

19. Your petitioners allege that as parties of record they have a clear right to the writ of error aforesaid; that it was the plain and positive duty of said Circuit Court, and of the judges aforesaid, to allow said writ of error, and to fix the penalty of the bond in error, and to sign a citation on said writ of error; and that your petitioners have no adequate remedy in the premises whatsoever, except by *mandamus* from this honorable Court. *Ex parte* Cutting, 94 U. S. R. 14.

20. Waiving all reference to questions which will properly arise upon the hearing of the writ of error, your petitioners beg leave to state some of the reasons why they are clearly entitled to a *mandamus* from this Court.

(*a*). The matter in dispute in the proceeding aforesaid, was the right of the petitioner (Hewitt Coburn, Jr.) to demand and receive from the Commonwealth of Virginia $22,716 of the bonds of said Commonwealth in exchange for $22,716 of past-due coupons cut from other bonds of said Commonwealth.

(*b*). He alleged in his petition that said $22,716 of coupons were worth forty cents on the dollar—that is to say, the sum of $9,086.40, and that the bonds (Riddleberger bonds) which he claimed the right to demand and receive in exchange for said coupons were of the value of fifty-three cents on the dollar—that is to say, the sum of $12,039 48;

so that, in any event, the value of the matter in dispute, as set forth in the plaintiff's preliminary pleading, exceeded (exclusive of costs), "the *sum* or value of five thousand dollars."

(*c*). The *sum* of money specified in the judgment aforesaid against your petitioners (in effect against the State of Virginia) was $22,716; and therefore the question of its *value* was irrelevant and immaterial.

(*d*). The said Circuit Court adjudged that the said $22,716 of coupons past due, the consideration moving from the *Actor*, were the exact equivalent, dollar for dollar, of the $22,716 of Riddleberger bonds for which judgment was given against the *Reus*, your petitioners.

(*e*). Nevertheless, said Circuit Court certified that the difference between these two equal quantities, exceeds $500, and is less than $5,000. Said certificate is a solecism, and is inconsistent with the judgment itself, and must be regarded as surplusage.

(*f*). In all courts of justice the consideration moving from the plaintiff, is assumed to be the exact equivalent of the judgment against the defendant. The difference between the two, judicially, must necessarily be nothing. The *sum* or value of either must be the measure of the matter in dispute.

(*g*). An inferior court will not be permitted, by an arbitrary certificate as to the *value* of the matter in dispute, to oust the appellate jurisdiction of the superior court. A judgment against John Doe for $100,000, may possibly be worth less than one hundred cents. Nevertheless, John Doe would have the right to appeal.

21. For the foregoing, and for other reasons apparent on the face of this petition, and the exhibits filed therewith, your petitioners pray your honors to award a rule against the said Circuit Court of the United States for the Eastern District of Virginia, and the honorables

Hugh L. Bond and Robert W. Hughes, judges of said court, returnable here at such day as your honors may indicate, requiring them to show cause, if any they can, why a *mandamus* should not be issued from this court, commanding said Circuit Court, and said judges, or one of them, to allow your petitioners a writ of error to the judgment aforesaid as required by law, and to fix the penalty of the bond in error, and to sign a citation on said writ of error, as required by law, in order that the said judgment may be reviewed and re-examined, and reversed or affirmed by the Supreme Court of the United States.

22. And in default of good cause shown, your petitioners pray your honors to issue a peremptory *mandamus* against said Circuit Court, and the said judges, as above fully indicated and earnestly prayed.

And your petitioners will ever pray, &c.

F. S. BLAIR,
Attorney-General of Virginia, for Petitioners.

October 13, 1884.

1K-178

SUPREME COURT OF THE UNITED STATES.

EX PARTE T. TEMPLE CROUCH.

Petition for Writ of Habeas Corpus.

SUPREME COURT OF THE UNITED STATES.

EX PARTE T. TEMPLE CROUCH.

Petition for Writ of Habeas Corpus.

To the Honorable, the Supreme Court of the United States.

Your petitioner, T. Temple Crouch, would respectfully represent that he is detained in custody by N. M. Lee, sergeant of the city of Richmond, Virginia, in violation of the Constitution of the United States.

Your petitioner desired to take out a license under the revenue laws of the State of Virginia, to sell goods as a sample merchant in the city of Richmond, in accordance with the 30th section of the act of the General Assembly of the State of Virginia approved March 15th, 1884, and accordingly, on the 26th day of September, 1884, he tendered to Samuel C. Greenhow, who is the treasurer of the city of Richmond, through his deputy, Seaton G. Tinsley, five coupons, each of which was for fifteen dollars, and, in addition thereto, seventy-five cents of lawful money of the United States, in payment of his license tax as a sample merchant. That each of said coupons was cut from a bond issued by the State of Virginia under the provisions of an act of the General Assembly of the State of Virginia approved March 28th, 1879, entitled "An act to provide a plan of settlement of the public debt," and each one was overdue and past maturity, and bore upon its face the contract of the State of Virginia that it should be received in payment of all taxes, debts, dues, and demands due said State. That when he made said tender he demanded of said Greenhow, through his said deputy, a certificate in writing stating that he had deposited with him said coupons and money, but the said Greenhow refused to receive said coupons and money, and refused to give to your petitioner said certificate or any other certificate.

That he refused to receive said coupons and money because an act of the General Assembly of the State of Virginia approved February 7th, 1884, forbade him to receive said license tax in coupons, and because the 112th section of an act of said General Assembly approved March 15th, 1884, provides that all license taxes shall be paid in current money of the United States, and not in coupons. That your petitioner thereupon made the affidavit hereto attached marked A, and prayed to be read herewith,

and presented it to R. B. Munford, who is the commissioner of the revenue for the city of Richmond, and demanded of him a license to sell goods as a sample merchant, and at the same time he presented to the said Munford the paper hereto attached marked B, which is prayed to be read as a part of this petition, and at the same time he offered to pay the said Munford any and all fees that he was entitled to receive before issuing said license, but the said Munford refused to issue a license to your petitioner to sell as a sample merchant. That thereupon your petitioner did make a sale of certain goods in the city of Richmond by sample, after he had made said tender of coupons and after he had demanded said license.

That after he had made said sale, the attorney for the Commonwealth for the city of Richmond, by leave of the court, filed an information against him in the Hustings Court for the city of Richmond for making said sale without a license. That he was thereupon arrested by order of said court and committed to the custody of N. M. Lee, sergeant of the city of Richmond, to be held by him for trial on said information, and he is now in his said custody, being held by him for said trial. That the said treasurer refused to receive said coupons in payment of your petitioner's license tax, and the said commissioner of the revenue refused to issue a license to him because said act of February 7th, 1884, which is chapters 83 and 153 of the laws of 1883–'84, and the 112th section of the act of March 15th, 1884, which is chapter 450 of the laws of 1883–'84, forbade them to receive said coupons or to issue said license without a payment of the license tax in coin or current paper money, and the said Commonwealth's attorney filed said information against your petitioner, and the said court ordered his arrest because certain statutes of the State of Virginia command his arrest and prosecution for selling goods by sample without a license, notwithstanding his said tender of coupons in payment of his license tax. That each and every one of said statutes is repugnant to the Constitution of the United States and is void and of no effect.

That by virtue of the contract which the State of Virginia made and entered into when she issued said coupons your petitioner acquired a right to pay his said license tax with said coupons, and to stand, after a tender of said coupons for his license tax, on a footing just as favorable as the footing of any other sample merchant who might pay his license tax with gold coin and receive a license receipt therefor. That any and every act of the General Assembly of the State of Virginia which undertakes to prevent your petitioner from paying his said license tax with said coupons, o to punish your petitioner for doing business without a license after a tender by him of said coupons, is inconsistent with said contract, and is therefore null and void, and, your petitioner being held under such an act is therefore held in violation of the Constitution of the United States.

It has been argued against the right of your petitioner to do business without a license after a tender by him of coupons, that it was his duty to submit to the mandate of the State's statute, abandon his business, remain in idleness, and sue the State's officers, either for damages in depriving him of his means of earning a living, or by way of *mandamus* to compel said officers to issue a license to him. That the violation of one law by said officers in their refusal to receive his coupons and issue him a license, gave him no right to violate the criminal laws of the State.

Your petitioner makes brief answer to this argument, that if it was a part of the State's contract that she would receive her coupons in payment of his license tax, then each and every one of her statutes which prohibits him from paying his license tax with coupons, and each and every one which undertakes to punish him for conducting his business without a license after he has tendered said coupons in payment of the tax, is inconsistent with her contract, and is therefore no act at all. Your petitioner submits that the contract that she would receive the coupons in payment of the tax, necessarily carried with it as an incident the further contract that he who should offer to pay the State's tax with the coupons should stand in all respects upon as good and favorable a footing as he who should actually pay his license tax in gold coin and receive his license receipt therefor. This must be so, otherwise the contract that the coupon should be a good tender for a license tax is utterly valueless.

If the owner of the coupon says to the merchant about to buy his stock of goods, "Buy my coupon, tender it for your tax, and if the collector refuses it, close the doors of your store, and sue him for the damages he causes you by destroying your business," the merchant will reply, "I cannot afford to give up my business for the chance of getting compensation for it out of that officer through the verdict of a jury. The jury may estimate the value of my business far below what its real profits to me are; and besides, if they should give me full compensation for a year of inaction, still, my trade, in the mean time, will have gone off to other parties, and at the end of the year I shall have to start again as a beginner. The only advantage you offer me to induce me to buy your coupon is the difference between the market value of your coupon and the face value of the same amount of gold coin. I cannot afford to give up my business if you were to make me a present of coupons enough to pay my tax."

If he is urged to buy and then apply for a *mandamus* to make the officer give him a license, he will make the same reply. He will say, "Still, I must close my store whilst the *mandamus* proceedings are being forced to a judgment. I cannot tell how long that may be. It may require an appeal to the Supreme Court of the United States, with a delay of four years whilst the case is waiting its turn on the docket of that court. The difference between gold coin and the price at which you offer your coupon is not sufficient to pay me for lying out of my business."

There is an old case reported by Latch at page 47, which is very analogous to the case under consideration. A. B. contracted with J. S. that J. S. might freely enter his house at his pleasure. When J. S. came to enter, A. B. took him by the sleeve, and said, "If you enter there I will pull you by the ears." The question was whether A. B.'s contract was broken, and it was held that it was. A. B.'s position was very much that now taken by the State of Virginia. When she was begging her creditor to release her from one third of her debt she agreed with him that he might pay his license tax with the new coupons. Having secured the release, she now refuses to receive the coupons, and punishes him for pursuing his daily avocations after he has offered to pay his taxes on those avocations with the coupons that she contracted to receive for them. If the conduct of A. B. was a breach of his contract, how much more is the conduct of the State of Virginia a breach of hers?

Upon the theory of the minority of the court in the case of Antoni v. Greenhow, 107th U. S. R., your petitioner must have the right to pursue his business after a tender of coupons, or he is wholly without redress. The opinion of the minority in that case proceeds upon the proposition that the State's officers cannot be sued. Then, if your petitioner may not pursue his business after he has tendered his coupon he has no alternative, but must give up his business and starve.

In *ex parte* Burnett, 30 Ala., where a void law imposed a license tax on a merchant, and he went on with his business despite the law and was arrested and fined, the Supreme Court of Alabama discharged him on *habeas corpus*.

Your petitioner does not argue that if there were no statute of the State commanding her officers to refuse her coupons, he might still pursue his business after tendering the coupons, without a license. By no means. In that case it may be that he would have to proceed against the officer either by *mandamus* to compel him to issue a license, or for damages in keeping him out of his business. But that is not the case under consideration. In the case under consideration the State has ordered her officer to refuse the coupon, and the question is whether that act is a valid act.

If the officer refuses of his own motion, the peace and order of society may demand that the aggrieved party shall appeal to the law for his vindication, the law assuming that such officer will never violate its commands again, after he has once felt its heavy hand. But where the law commands the officer to refuse the coupons, the refusal is not the act of the officer, but the act of the law, and if the law be one inconsistent with the contract, it is no law at all, nor is that one a law which commands a prosecution for doing business without a license after the coupon has been tendered in payment of the tax.

Your petitioner cannot be said therefore to have violated any criminal law of the State, since the pretended statutes which command a refusal of the coupons and which forbid your petitioner to prosecute his business without a license, are not statutes at all. They do not exist.

The case is to be regarded thus: If there is any act of the Virginia Legislature which requires a merchant to have a license after a tender of coupons for his license tax (the State having commanded her officers to refuse them), then that law is inconsistent with her contract that she would receive coupons for license taxes and that he who should tender coupons for his license tax should stand in the position of one who had paid his license tax, and, being inconsistent with the contract, it is no law. Therefore there is really no law which requires a sample merchant to have a license after tendering coupons, since the pretended law is a void statute; and the sample merchant violates no statute in selling without a license after he has tendered coupons for his tax.

Suppose that a statute of Virginia should provide that no farmer who had tendered coupons in payment of the tax on his farm and horses should sue a collector who seized his horses to compel payment of his tax in

coin, for his trespass in making that seizure, unless he had a written acknowledgment from the collector that he had made such tender: would such an act be consistent with the State's contract that her coupons shall be a legal tender for her taxes? Yet there is no difference in principle between such an act and one undertaking to punish one for carrying on his business without a license after he has tendered coupons in payment of his tax. Of course, this argument has no relation to such businesses as lottery or sale of liquors, which, being noxious in themselves, may be altogether forbidden by the State under the police power, and may therefore be authorized on such terms as she pleases. It applies only to businesses innocuous in themselves, and which the citizen has a right to earn his livelihood by.

Why should the State have a right to punish your petitioner for pursuing his business without a license after he has tendered her coupons in payment of his license tax? Her right to punish is the power by which she compels performance of all that she has a right to exact. But your petitioner had offered to do every single thing that she exacts as a condition precedent to his right to conduct his business. He had complied with every requirement of her statutes, and he had offered to pay his tax in what she had contracted to receive for his tax. He was in default in no particular. Of what advantage can it possibly be, therefore, for her to be permitted to punish him for doing business without the paper that is called a license, which is really nothing but a written acknowledgment that your petitioner has paid his tax? He had performed the vital thing. He had paid his tax. Now, the power to punish is a power with which the State is intrusted to compel payment of the tax. But if the tax is paid, why should she be permitted to punish?

It may be said that the payment of a license tax entitles the party to sell goods in every county in the State, and that as the tax may be paid in one county and the party may be selling in another, the State ought to have power to compel this merchant to exhibit his license in the county in which he offers to sell, in order that her officers in that county may know that she has received her revenue. But if the sample merchant has done all that he can do to procure a license, why punish him for being without one? The person to punish is the delinquent officer who refuses to give him the license. But here the State first forbids the officer to furnish the license, and then undertakes to punish the merchant for being without the license. This is nothing but a claim upon the part of the State that she can, at her pleasure, force the lawyer and doctor to abandon their professions, the carpenter to close his shop, the grocer and the dry-goods merchants to go out of business. If she has this power, then constitutional government is at an end and her will is the supreme law of the land. Her power to punish your petitioner for selling goods without a license would not be questioned if her statutes commanded her officers to receive his coupons and punished them for refusing the coupons and for refusing to issue to your petitioner a license after he had tendered coupons. In that case she would undoubtedly have a right to punish your petitioner for selling goods without a license. But that is not the case.

Your petitioner therefore prays that this honorable court will award him a writ of *habeas corpus* directed to N. M. Lee, sergeant of the city of

Richmond, Virginia, commanding him to produce the body of your petitioner before this honorable court, together with the cause of his detention, so that the same may be inquired into and your petitioner discharged from his unlawful custody.

T. TEMPLE CROUCH.

State of Virginia,
City of Richmond—to wit:

This day T. Temple Crouch personally appeared before me, a notary public in and for said city, and made oath that the allegations of the foregoing petition are true.

Given under my hand this day of 1884.

N. P.

Affidavit Marked (A).

State of Virginia,
City of Richmond—to wit:

This day T. Temple Crouch personally appeared before me, J. M. Skinner, a notary public in and for the city aforesaid, and made oath that on the 26th day of September, 1884, he tendered Samuel C. Greenhow, through his deputy Seaton G. Tinsley, five coupons, each of which was for fifteen dollars, and seventy-five cents in lawful money of the United States.

That each of said coupons was cut from a bond issued by the State of Virginia under the provisions of an act of the General Assembly of the State of Virginia approved March 28th, 1879, entitled "An Act to provide a plan of settlement of the public debt," and each one was overdue and past maturity, and bore upon its face the contract of the State of Virginia that it should be received in payment of all taxes, debts, dues, and demands due the said State.

That the said Samuel C. Greenhow is the treasurer of the city of Richmond, Va. That he made said tender for the purpose of procuring a license to sell goods as a sample merchant by sample in the State of Virginia, and that at the time of said tender he demanded of said Greenhow a certificate in writing stating that he had deposited said coupons with him for the purpose of obtaining a license to sell goods as a sample merchant by sample. But that the said Greenhow, by his said deputy, refused to receive said coupons and money, and refused to give him the said certificate or any other certificate.

Given under my hand this 27th day of September, 1884.

J. M. SKINNER, N. P.

Paper marked (B).

To R. B. Munford,

Commissioner of the Revenue for the city of Richmond.

I hereby make application to you for a license to sell goods as a sample merchant. I propose to do businesss as a sample merchant. My residence is Richmond city. I propose to conduct said business in the city of Richmond, and the amount of assessment prescribed by law as a condition precedent to issuing of such license is seventy-five dollars. I propose to do said business in the name of T. Temple Crouch.

T. TEMPLE CROUCH.

September 27th, 1884.